

SUPPLEMENT
TO
SOHONI'S COMMENTARIES
ON
The Code of Criminal Procedure,
Act V of 1898,
As Amended up to 1935

BY
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PREFACE.

THIS little volume is intended for use as a Supplement to Sohoni's Commentaries on the Code of Criminal Procedure, Thirteenth Edition, published in 1931. The subject has been dealt with on the same lines as in the main book and wherever possible, reference has been given in this Supplement to the page and the number of the note in the main book where the subject is discussed with reference to the earlier decisions.

The case-law on the Code and the several Acts contained in the Appendices to the main book has been brought up to June, 1935. Except in the case of references to the authorised Reports (parallel references to which will be found in the 'List of Cases cited') complete parallel references to all journals and reports have been given in the body of the volume. The amendments to the Code since 1923 up to date have been indicated under the respective sections. An exhaustive Index to this Supplement is also given at the end.

MADRAS, }
30th July, 1935. }

W. T. SUNDARARAJAN.

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SUPPLEMENT
TO
SOHONI'S COMMENTARIES
ON THE
CODE OF CRIMINAL PROCEDURE

Act V of 1898 as amended up to 1935.

[*Note.*—The reference within brackets against each heading is to the page and number of the Note in the main book (thirteenth edition) where the subject is discussed with reference to earlier decisions.]

CHAPTER I

PRELIMINARY.

SECTION 1.

Note.—**Special law** [*P.* 14, *n.* 7]—A “special law” is defined in s. 41, Penal Code, as a law applicable to a particular subject. The Evidence Act is therefore such a special law, as it is a law specially applicable to the subject of evidence. Therefore under this section in the absence of a specific provision to the contrary in the Criminal Procedure Code, nothing in the Code would affect anything in the Evidence Act. 55 A. 463.

SECTION 4.

SUB-SECTION (1).

Clause (f). “Cognizable Offence.”

Note.—**Under any law** [*P.* 17, *n.* 1]—Under Schedule II to the Code, offences under other laws punishable with imprisonment for three years or upwards, but less than seven years are cognizable offences. The words “or under any law for the time being in force in s. 4 (e) have therefore reference to such offences which are punishable with imprisonment for less than three years, but are specified as offences for which the police may arrest without a warrant, that is, offences which but for the special provision would not under the Code be cognizable offences.” A. I. R. 1934 Nag. 71 = 30 N. L. R. 269 = 35 Cr. L. J. 1097 = 150 I. C. 623 = 1934 Cr. C. 276.

Clause (h). “Complaint.”

Notes—1. **Generally anyone may complain** [*P.* 17, *n.* 3 (ii)]—There is nothing in the definition of complaint which requires it to be made by the person aggrieved. 53 A 208; A. I. R. 1929 C. 639 = 33 C. W. N. 576 = 30 Cr. L. J. 1013 = 119 I. C. 130 = 1929 Cr. C. 357.

2. **Essentials of Complaint** [*P.* 18, *n.* 4]—(i) *Must allege an “offence.”*—It is essential that an allegation should be made of the commission of an offence. An application to take preventive measures under s. 107 or s. 145 does not amount to a “complaint.” 6 Luck. 354. See note 5, *infra*.

(ii) *Must be made with a view to the Magistrate taking action under this Code.*—It is of the essence of a complaint that the accusation should have been made with a view to action being taken under the Code. An express request to that effect is not however necessary. Whether the statement was made with a view to action being taken upon it as upon complaint, must be determined in the light of the circumstances. A. I. R. 1930 Pat. 550 = 129 I. C. 87 = 1930 Cr. C. 1034.

3. **What the complaint must set out** [*P.* 18, *n.* 5]—The fact that the particular section of the Penal Code is not mentioned in the complaint is immaterial, if the facts alleged disclose an offence punishable under that section. A. I. R. 1929 M. 188 = 2 M. Cr. C. 60 = 29 Cr. L. J. 1062 = 112 I. C. 566 = 11 A. I. Cr. R. 362.

4. What would amount to a complaint [P. 18, n. 9]—Where the District Magistrate referred a complaint to the local Magistrate for inquiry as a result of which that Magistrate reported that proceedings should be taken against certain persons including the complainant, the report was a complaint within the meaning of s. 4 (b). *A. I. R. 1933 Pat. 87 = 13 P. L. T. 791 = 34 Cr. L. J. 237 = 141 I. C. 810 = 1933 Cr. C. 211.* Where a Tahsildar wrote to the Sub-divisional Magistrate that certain persons committed an offence under s. 353, I. P. C. and requested that the said persons may be tried under the said section, all the ingredients of a complaint as defined in this section were present and the document was clearly a complaint. *53 A. 203.*

5. What would not amount to a complaint [P. 19, n. 10]—An application under s. 107 cannot amount to a complaint because it does not allege that any person has committed an offence. *53 A. 148; 6 Luck. 354; A. I. R. 1931 Lah. 185 = 31 P. L. R. 350 = 127 I. C. 716 = 32 Cr. L. J. 21 = 15 A. I. Cr. R. 214 = 1931 Cr. C. 305.* An application to the Magistrate to have the Police investigation expedited, could not come under the category of "complaint" as defined in this section. Dismissal of such an application under s. 203 is therefore not necessary for instituting proceedings against the petitioner under s. 211, I. P. C. for preferring a false charge to the police. *A. I. R. 1932 C. 237 = 35 C. W. N. 1210 = 1932 Cr. C. 213 = 137 I. C. 133 = 33 Cr. L. J. 406 = 18 A. I. Cr. R. 34.* Where the accused lodged information with the police of theft which the police found to be false and made a complaint under s. 182, I.P.C. against the accused, a petition by the accused stating that he could prove that the information given by him was true, cannot be treated as a "complaint" which should be first disposed of before he was prosecuted under s. 182, I. P. C. *A. I. R. 1930 Pat. 505 = 31 Cr. L. J. 1200 = 127 I. C. 287 = 1930 Cr. C. 933.*

6. Difference between information and complaint.—"Information" is not defined but has been held to cover statements of witnesses, communications by post, anonymous communications, and may be received in another capacity than that of Magistrate. The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute a person named as accused and he has then to decide whether he will accede to the request or not. If he does not, he must record his reasons under s. 202 (1) and may either make an inquiry himself or direct an inquiry or investigation or dismiss the complaint under s. 203 after recording his reasons. But in the case of receiving information the Magistrate is not asked to issue process and if he does not choose to act on the information, he need not record any reasons or pass any order. *53 A. 203.*

7. Police report when a complaint [P. 20, n. 11]—The charge sheet sent up by the police in a non-cognizable case can be treated as a complaint. *A. I. R. 1932 B. 610 = 34 Bom. L. R. 901 = 33 Cr. L. J. 733 = 139 I. C. 281 = 1932 Cr. C. 863; (1933) M. W. N. 876.*

8. Complaint is not evidence.—The complaint is in the nature of an indictment. Therefore averments in a complaint must be established and properly proved by evidence. Before anyone can be convicted on charges formulated in a complaint, all those charges must be fully and properly proved in accordance with the procedure and the law of evidence applicable to criminal charges. *A. I. R. 1934 C. 604 = 35 Cr. L. J. 996 = 149 I. C. 450 = 1934 Cr. C. 861.*

9. Stamp on complaint [P. 20, n. 12]—A complaint by an official in his official capacity does not require a court-fee stamp. *53 A. 203.*

Clause (i). "European British Subject."

Note.—The words "naturalised or domiciled" which follow the word "born" are disjunctive of and not conjunctive with what precedes. It is not necessary that a person should be a European British subject by birth and also be domiciled at the time in the British Islands or any Colony. *53 B. 149.*

The definition of "European British subject" is silent on the subject of a female European British subject ceasing to be such on her marriage to an alien. But change of domicile by marriage will not necessarily amount to a change of nationality. A European British subject by birth will not cease to be such merely by reason of her marriage with a subject of a Native State. *53 B. 149.*

Clause (j). "High Court."

Amendment.—This clause has been amended by the Oudh Courts (Supplementary) Act, 1925, Act XXXII of 1925 and the Sind Courts (Supplementary) Act, 1926, Act XXXIV of 1926. The amended clause will read thus—

"(j) "High Court" means, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon, the Chief Courts of Oudh and Sind and the Court of the Judicial Commissioner of the Central Provinces; in other cases "High Court" means the highest Court of Criminal Appeal or Revision for any local area; or, where no such Court is established under any law for the time being in force, such Officer as the Governor-General in Council may appoint in this behalf."

Note.—**Applicability of definition to trials of European British subjects** [*P. 22, n. 1*].—Where a European British subject waived his right to be tried as such before the City Magistrate, Peshawar, the special procedure provided for European British subjects ceased to apply and with it the first part of the definition of "High Court." The Court of appeal or revision would therefore be the Court of the Judicial Commissioner Peshawar as the highest local Court of criminal appeal. *A. I. R. 1933 Pesh. 6 = 1933 Cr. C. 148 = 141 I. C. 445.*

Clause (k). "Inquiry."

Note.—"Other than a trial" [*P. 22, n. 1*].—"Trial is not defined in the Code. The distinction between inquiry and trial would appear to be that up to the stage when the proceedings can result in a discharge they are only an inquiry and from the point at which they must result in a conviction or acquittal they become a trial. *8 Luck. 135.*

Clause (r). "Pleader."

Notes.—1. **Pleader must be authorised by law to practice.**—Advocates on the Appellate Side of the Bombay High Court who are precluded from practising in the Sessions Court by R. 10 of the Appellate Side Rules of that Court, do not come within the definition of the term "pleader" *quoad* the Sessions Court because they are not pleaders authorised by law for the time being in force to practise in that Court. *58 B. 456 (F. B.).*

2. **Other persons appointed** [*P. 27, n. 5*].—The words "any other person" are not restricted in their meaning and are not limited to a person authorised by law to appear in a particular Court. The words are not to be read *ejusdem generis* with the previous words and do not refer to advocates, pleaders or mukhtyars authorised under any law to practise. *36 Bom. L. R. 433 = A. I. R. 1934 B. 212 = 35 Cr. L. J. 1035 = 149 I. C. 1132 = 1934 Cr. C. 759.*

Clause (t). "Public Prosecutor."

Note.—The Legal Remembrancer, Bengal, is ex-officio Public Prosecutor on the Appellate Side of the High Court and as such has the power to instruct counsel, his authority to act for the Local Government being in no way dependent on a vakalatnama or warrant of attorney. *60 C. 633.*

Clauses (v) and (w). "Summons Case" and "Warrant Case."

Note.—**Abetment of offence is a Summons case when offence abetted is a Summons case.**—Where the offence dealt with is abetment of a specific offence, which offence is a summons case, then the abetment is also a summons case. An offence under s. 17 (1) Criminal Law Amendment Act is a Summons case and an abetment of the offence under s. 117, I. P. C. is therefore also a Summons case. *A. I. R. 1931 B. 199 = 33 Bom. L. R. 353 = 1931 Cr. C. 343 = 131 I. C. 472 = 32 Cr. L. J. 718 = 16 A. I. Cr. R. 338.*

SECTION 5.

Notes.—1. **Subject to any enactment** [*P. 29, n. 4*].—Where an offence is committed under a special law which can be investigated and tried only according to the provisions of that law, the police have no right to file a charge sheet or otherwise to proceed under Ch. XIV of the Code. *A. I. R. 1933 Sind 325 = 35 Cr. L. J. 129 = 146 I. C. 419 = 1933 Cr. C. 1077.*

2. **Conviction for same offence under two penal enactments illegal** [*P. 29, n. 5*].—Where the offence falls under two penal enactments, e.g., s. 24, Cattle Trespass Act and theft under the Penal Code, the offender may be punished under the one or the other; but not under both the penal enactments. (1930) *M. W. N. 529 = 33 M. L. W. 205 = A. I. R. 1931 M. 13 = 4 M. Cr. C. 139 = 32 Cr. L. J. 354 = 129 I. C. 451 = 1931 Cr. C. 32 = 15 A. I. Cr. R. 452.*

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

* * * * *

SECTION 7.

Notes.—1. Sub-section (1)—Sessions Divisions to be equivalent to a district or to a number of districts.

—The word “district” in s. 7, and the other sections is a district for the purpose of criminal administration, having a District Magistrate according to s. 10, and a Sessions Division under s. 7 (1) is equivalent of one such district or a number of such districts. The object of sub-section (1) is not to enable the Local Government to constitute Sessions Divisions out of districts but to lay down a rule governing the relations between Sessions Divisions and districts; that is, a Sessions Division shall not consist of half a district or even one and a-half districts, but shall consist of one district or of a plurality of whole districts without having a fraction. When a Sessions Division which was a district was split up into two Sessions Divisions by the operation of clause (1) each Sessions Division became a district. The constitution of two Sessions Divisions each consisting of a full district does not offend any section in the Code and is *intra vires* of the Local Government. **54 M. 943 (F. B.) [Jackson, J. Contra.]**

2. Sub-section (2).—The Local Government have got the power of altering the number and limits of divisions as well as the number and limits of districts. **54 M. 943 (F. B.)**

SECTION 9.

Notes.—1. Notification under Sub-section (2) is not an “administrative order.”—The term “administrative order” is one not known to law, British or Indian. Unlike France with its *décret administratif* (administrative law) and its *Concil d'Etat* (State Council) to administer it, administrative laws and administrative courts find no place in the constitution of Great Britain or India. The powers of the Local Government like the rights of other corporations and bodies can only be derived from the law and extend no further than what the ordinary law permits. The Executive Government, Local or Imperial, is as subject to the law and their acts and orders are not less open to test in the Courts than those of the humblest citizen. Therefore no special sanctity or legality attaches to a notification under s. 9 (2) and s. 193 (2) as falling within the category “administrative orders.” *Per Madgavkar, J.* **53 B. 576 (S. B.)**

2. Courts of Additional and Assistant Sessions Judges.—The Additional Sessions Judge and the Assistant Sessions Judge, though exercising jurisdiction as a Sessions Court, are while exercising their functions in respect of particular cases which have been made over to them, different Courts to the Sessions Judge appointed under sub-section (1). The Assistant Sessions Judge, the Additional Sessions Judge and the Sessions Judge exercise co-ordinate or equal jurisdiction of a Sessions Court within the limits of the authority conferred on them by the Code and are nevertheless different Courts each subordinate to the High Court. **55 B. 576 [S. B.]**

For the purpose however of making a complaint under s. 476 it was held in **58 C. 1117** that even though an offence be committed before the Court of the Additional Sessions Judge it must be deemed to be committed in the Court of Session and the Sessions Judge was therefore competent to make a complaint, there being only one Court of Session in each Sessions division sitting at different places and manned by a number of Judges.

Special orders with reference to particular cases. See note to s. 193.

SECTION 10.

Note.—One officer may be appointed District Magistrate for two Districts.—Section 10 directs that a District Magistrate shall be appointed for every district, but it does not follow that one officer should not be appointed as District Magistrate for two districts. **54 M. 943 (F. B.) See (1931) M. W. N. 1064.**

SECTION 12.

Note.—Jurisdiction of Magistrates extend throughout District unless restricted [P. 34, n. 3].—A Magistrate of the First Class whose powers have been gazetted throughout the District does not lose jurisdiction over a particular portion of the District by the mere fact that the District Magistrate has for the sake of convenience divided up the District into several ilaqs and the particular locality happened to be outside the ilaqa of the said Magistrate. **A. I. R. 1938 Lah. 143 = 34 P. L. R. 365 = 142 I. C. 430 = 1933 Cr. C. 241.**

SECTIONS 15 and 16.

Notes.—1. What is meant by “sit together”?—If sections 15 and 16 are read together the words “sit together” in s. 15 must be construed as equivalent to “constitute” so that the Local Government may direct any two or more Magistrates to constitute a Bench and invest that Bench with special power. Where the Local Government issued a notification directing that ten Magistrates should sit together as a Bench and conferred on the Bench first class powers and made rules that generally the Bench should consist of five members with a quorum of three, it does not mean that all the ten members should sit together to exercise first class powers. A Bench of three Magistrates, members of the Bench of ten, could properly try a case exercising the powers of a first class Magistrate. **A. I. R. 1934 B. 176 = 36 Bom. L. R. 314 = 1934 Cr. C. 664.**

2. Judgment signed by Bench Magistrates who never heard the evidence is illegal [*P. 36, n. 3*].—Where only three Magistrates of the Bench heard the evidence and tried the case but the Judgment was signed by seven, it was an illegality vitiating the conviction. **A. I. R. 1931 M. 494 = (1930) M. W. N. 770 = 3 M. Cr. C. 221 = 1931 Cr. C. 538 = 133 I. C. 4 = 32 Cr. L. J. 971.** Where one of the Magistrates did not take part in the proceedings throughout, but absented himself on some of the occasions when certain witnesses were examined, the conviction is unsustainable. If witnesses are examined by one or more Magistrates in the absence of one or more of those constituting the Bench, they cannot be considered to have been examined by the Bench. **A. I. R. 1932 A. 127 = 1932 Cr. C. 152 = 1932 A. L. J. 42 = L. R. 13 A. (Cr.) 15 = 17 A. I. Cr. R. 125 = 135 I. C. 835 = 33 Cr. L. J. 200 ; 54 A. 413.** But where according to the rules framed under s. 16 two Magistrates were to form a quorum and it was directed that the same two Magistrates must hear a particular case from start to finish and sign the Judgment, the fact that the case commenced with three Magistrates but one of them subsequently absented himself and the other two alone heard the evidence and delivered Judgment, did not invalidate the trial. **55 A. 459.** The minimum number for a Bench in the Madras Presidency is three Magistrates and where of the four Magistrates who signed the Judgment only two had been present throughout the proceedings the conviction was illegal. **(1933) M. W. N. 93.** See note 1 to s. 350-A.

SECTION 17.

Note.—Powers of Additional Sessions Judge [*P. 44, n. 10*].—The Code strictly limits the powers of the Additional Sessions Judge to such as are conferred upon him directly by the Local Government or by the Sessions Judge of the division in which he exercises power. Power to grant or cancel bail could not be exercised unless so conferred. **A. I. R. 1930 Rang. 335 = 32 Cr. L. J. 148 = 128 I. C. 577 = 1930 Cr. C. 1151.**

SECTION 21.

Note.—Subordination of Presidency Magistrates to Chief Presidency Magistrate [*P. 46, n. 1*].—*Calcutta* :—All stipendiary as well as non-stipendiary Presidency Magistrates have been declared by the Local Government to be subordinate to the Chief Presidency Magistrate. An Additional Chief Presidency Magistrate has been vested with all the powers of a Chief Presidency Magistrate under s. 18 (4). An Additional Chief Presidency Magistrate has therefore power to send a case under s. 202 to a Subordinate Magistrate. **61 C. 467.**

CHAPTER III.

POWERS OF COURTS.

* * * *

SECTION 29-B.

Notes.—1. This section is only permissive.—The words “may be tried” are only permissive. A Magistrate other than one of those referred to in this section before whom a juvenile offender is brought, has a discretion either to deal with the matter under the ordinary provisions of the Code or direct that the accused be dealt with under this section. **A. I. R. 1931 B. 198 = 33 Bom. L. R. 312 = 1931 Cr. C. 342 = 131 I. C. 476 = 32 Cr. L. J. 722 ; A. I. R. 1934 B. 211 = 36 Bom. L. R. 435 = 35 Cr. L. J. 1033 = 149 I. C. 1135 = 1934 Cr. C. 758.**

Offences punishable with death or transportation not to be tried by the Magistrates referred to.—This section lays down by implication that offences punishable with death or transportation for life and which is exclusively triable by the Court of Session is not to be tried by the Magistrates referred to in this section. 59 C. 856.

SECTION 30.

Note.—Magistrates must purport to act under this section [*P. 57, n. 6*].—Where the trying Magistrate though invested with the powers of a Special Magistrate under the Emergency Powers Ordinance, 1932, headed the proceedings as “In the Court of the Magistrate F. C. Sholapur” and signed it as “Magistrate F. C.,” it was held that the fine of Rs. 1,500 imposed by him was in excess of the sum which he was entitled to impose. *A. I. R. 1933 B. 53 (S. B.) = 34 Cr. L. J. 162 = 141 I. C. 574 = 1933 Cr. C. 122*. On the same principle it was held that where a first class Magistrate invested with enhanced powers under this section did not sign himself as a Magistrate exercising such powers, he could not pass a sentence in excess of what an ordinary Magistrate of the first class could pass. *A. I. R. 1934 Lah. 361 (1) = 35 Cr. L. J. 1283 = 151 I. C. 265 = 1934 Cr. C. 603*.

SECTION 35.

Notes.—1. **Separate sentences should be passed on conviction for each offence** [*P. 65, n. 10*].—In a case where the provisions of s. 71 Penal Code do not come into play, the Court has no discretion whatever to pass only one sentence for one offence and decline to pass sentences for the other offences of which it may find the accused guilty. To hold otherwise would be to render s. 35 inconsistent with ss. 245 and 258 under which, the Magistrate if he finds the accused guilty, is bound to pass sentence upon him according to law. Where therefore the accused was found guilty of offences under s. 37 and s. 30 (*d*), Excise Act, it was incumbent on the Magistrate to pass sentence in respect of both the offences and the ruling in 1 *L. B. R. 33*, where it was held that in such cases separate sentences were illegal, is no longer to be regarded as an authority on the construction of s. 35. 12 *Rang. 419*. Where the accused is convicted for more than one offence, a separate sentence must be passed in respect of each such conviction subject to the provisions of s. 71, I. P. C. The word “may” in the section not only confers a power but also imposes a duty of putting it in use. *A. I. R. 1933 Sind 9 = 26 S. L. R. 416 = 34 Cr. L. J. 143 = 141 I. C. 230 = 1933 Cr. C. 33 = 19 A. I. Cr. R. 216*.

2. **Facts constituting several distinct offences constituting when combined, a different offence** [*P. 67, n. 18*].—*Rioting and hurt caused by other members* [*n. 18 (d)*].—There can be separate convictions for an offence punishable under s. 147, I. P. C. and one punishable under s. 149 and s. 325, I. P. C. or any constructive offence with reference to s. 149, I. P. C., but separate sentences cannot be passed. 57 *M. 643*; 8 *Pat. 274*.

3. **Sentences of imprisonment in default of payment of fine cannot be made to run concurrently** [*P. 69, n. 21*].—The provision for the passing of concurrent sentences refers to substantive sentences only and not to sentences of imprisonment in default of payment of fine. *A. I. R. 1929 Sind 179 (1) = 30 Cr. L. J. 907 = 118 I. C. 224 = 1929 Cr. C. 452*.

SECTION 39.

Note.—**Criminal powers cannot be granted retrospectively.**—A notification investing a Magistrate with summary powers with retrospective effect is not authorised by this section. *A. I. R. 1933 Pesh. 97 (1) = 1934 Cr. C. 50 = 147 I. C. 737*.

SECTION 40.

Note.—When a Subordinate Judge invested with Magisterial powers is transferred to another place as Subordinate Judge, he loses such Magisterial powers in the absence of a fresh notification investing him with such powers to be exercised at the place to which he is transferred. *A. I. R. 1933 Sind 398 = 35 Cr. L. J. 187 = 146 I. C. 893 = 1933 Cr. C. 1438*.

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

* * * * *

SECTION 47.

Note.—It is not illegal to arrest a man in a house other than his own, it is only illegal to enter a house to make the arrest during the prohibited hours. (1932) M. W. N. 856 (2).

SECTION 51.

Note.—Is consent of the arrested person necessary for his medical examination?—In 35 C. W. N. 1212 = 54 Cr. L. J. 499 = 33 Cr. L. J. 11 = 134 I. C. 1033 = 1931 Cr. G. 753 = A. I. R. 1931 G. 601, *Lort-Williams, J.* held that the police are not entitled without statutory authority and for the purpose of procuring evidence against them to commit assaults on prisoners, for the examination of the accused without their consent would amount to an assault. If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused, there was no knowing where such procedure would stop. It is contrary to the spirit of the law to obtain evidence in this way. But *Ghose, J.* took the view that under s. 51 of the Code and under the Prisons Act the prisoner is liable to be searched and his consent would not be necessary. Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search is not provided for by the Code, and in such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report.

SECTION 54.

Amendment.—In clause *sixthly* of sub-section (1) for the words "Army or Navy" the words "Army, Navy or Air Force" were substituted by Act X of 1927 and the words "or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service" were omitted by Act XXXV of 1934. The clause will now read as follows:—

"*Sixthly*—Any person reasonably suspected of being a deserter from His Majesty's Army, Navy or Air Force ;"

Notes.—1. Any Police-officer [P. 86, n. 3]—A Village chowkidar is not a "Police-officer" within the meaning of this section. 52 A. 203.

2. May arrest [P. 86, n. 8]—S. 54 gives very wide powers to the police and ought to be rigorously construed. The "reasonable suspicion" and "credible information" must relate to definite averments which the police-officer must consider for himself before he acts under this section. A. I. R. 1934 Sind 197 = 28 S. L. R. 203 = 153 I. C. 361 = 1934 Cr. C. 1407.

3. Clause 7.—Arrest without warrant for offence committed out of British India [P. 91, n. 33]—Clause (7) postulates the existence of two factors; the first, knowledge by the policeman who effects or attempts to effect the arrest and secondly the existence as a fact, as opposed to any belief which may be entertained by any person, of a warrant which has been issued under the Extradition Act. A. I. R. 1933 Lah. 159 = 34 Cr. L. J. 679 = 144 I. C. 67 = 1933 Cr. C. 304.

SECTION 56.

Notes.—1. Specifying the offence or other cause for which the arrest is to be made [P. 95, n. 2]—It is sufficient for the police-officer in his requisition to specify section 55 and by so doing he conveys sufficient information to the person to be arrested. 1934 A. L. J. 997 = A. I. R. 1934 A. 879 = 4 A. W. R. 107 = 1934 A. L. R. 914 = 35 Cr. L. J. 1452 = 151 I. C. 834 = 1934 Cr. C. 1085.

2. **Name of police-officer making arrest need not be endorsed on the requisition.**—The section only says that the order in writing shall be “delivered” to the officer required to make the arrest. There is nothing in the section to show that the name of the officer required to make the arrest should be endorsed on the requisition. 1934 A. L. J. 997 = A. I. R. 1934 A. 879 = 4 A. W. R. 107 = 1934 A. L. R. 914 = 35 Cr. L. J. 1452 = 151 I. C. 834 = 1934 Cr. C. 1033.

SECTION 59.

Notes.—1. **Private person may arrest only if offence committed in his view** [P. 97, See n. 1]—The words “in his view” mean “in his presence” or “within sight of him” and not “in his opinion.” A. I. R. 1933 Pat. 508 = 14 P. L. T. 464 = 1933 Cr. C. 1079.

2. **Make over the arrested person to a police-officer** [P. 98, n. 6]—Before the amendment in 1923 it had been held in some cases that a *chowkidar* not being a police-officer had no power to receive the custody of a person arrested under this section, by a private individual and to take such person to the police station. But the amendment in 1923 inserting the words “or cause him to be taken in custody” has made it impossible to raise this technical argument now. A. I. R. 1932 Pat. 214 = 13 P. L. T. 321 = 1932 Cr. C. 495 = 138 I. C. 95 = 33 Cr. L. J. 872 = 18 A. I. Cr. R. 342.

CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

SECTION 68.

Note.—**Formalities and contents of valid summons** [P. 102, n. 7.]—The accused is entitled under the law to know what offence he has committed and it is the duty of the prosecution to put in the sections or rules which the accused is alleged to have contravened. Omission to state such particulars causes prejudice to the accused and the defect is not cured by s. 537. A. I. R. 1934 Oudh 370 (2) = 11 O. W. N. 828 = 1934 O. L. R. 856 = 35 Cr. L. J. 1161 = 150 I. C. 941 = 1934 Cr. C. 1156.

SECTION 70.

Note.—**Cannot be found by the exercise of due diligence** [P. 106, n. 2]—Where the summons merely bears the endorsement “served on the durwan” and the process server’s return does not show that any attempt was made to find out the accused, the provisions of this section are not complied with and hence the conviction should be set aside. A. I. R. 1932 C. 62 = 35 O. W. N. 868 = 1932 Cr. C. 10 = 33 Cr. L. J. 264 = 136 I. C. 135 = 17 A. I. Cr. R. 399.

SECTION 75.

Note.—**Essential requisites of a warrant** [P. 110, n. 6]—Where a person is arrested pursuant to or under cover of a warrant, the warrant must comply strictly with the terms of the section. To hold that s. 54 applies in such cases would be to nullify several salutary provisions contained in Part B, Chapter VI of the Code relating to execution of warrants of arrests. A. I. R. 1932 Pat. 171 = 13 P. L. T. 125 = 1932 Cr. C. 347 = 138 I. C. 844 = 33 Cr. L. J. 706.

Warrant must be signed by the presiding officer [n. 6 (ii)]—“Presiding Officer” means the officer who presides in the Court at the time when the warrant comes to be signed and not necessarily the Magistrate who has presided in the Court at the time when cognizance was taken of the offence. Where a person was appointed by the Government with power to take cognizance of offences and to perform the functions of the Sub-divisional Officer while he was away from the station, he is the presiding officer within the meaning of this section and could properly sign the warrant the issue of which had been directed by the person whose place he was for the time being filling. A. I. R. 1932 Pat. 175 = 13 P. L. T. 167 = 1932 Cr. C. 351. A warrant signed by the Deputy Nazir is illegal when that officer had not been empowered legally or given any lawful authority to sign warrants. 66 M. L. J. 403.

SECTION 79.

Notes.—1. Endorsement need not be on the warrant itself.—What is essential under the section is the authority in writing. It is immaterial whether the authority is on the warrant itself or on a separate piece of paper, but so long as the authority is there, it satisfies the requirements of the section. A letter attached to the warrant complies with the provision. **A. I. R. 1931 Sind 89 = 1931 Cr. C. 489 = 25 S. L. R. 117 = 132 I. C. 465 = 32 Cr. L. J. 916.**

2. Designation of Police-officer need not be endorsed.—This section only requires the name to be endorsed, and failure to endorse the designation will not invalidate the arrest. **A. I. R. 1932 Pat. 171 = 13 P. L. T. 135 = 1932 Cr. C. 347 = 133 I. C. 844 = 33 Cr. L. J. 706.**

SECTION 80.

Note.—Fact of notification need not be mentioned in report.—This section does not require the fact of notification to be mentioned in the report. It is sufficient if it is made clear that the requirements of the section have been substantially complied with. **A. I. R. 1932 Pat. 171 = 13 P. L. T. 135 = 1932 Cr. C. 347 = 133 I. C. 844 = 33 Cr. L. J. 706.**

SECTION 87.

Note.—Effect of not giving thirty days' time [P. 120, n. 10].—The failure to give the necessary notice does not amount to more than an irregularity which can be cured by the application of s. 537. **A. I. R. 1934 Lah. 987 = 36 P. L. R. 262 = 133 I. C. 954 = 1934 Cr. C. 1391.**

SECTION 88.

Notes.—1. Attachment of movable property.—The doors of a house are to be considered as part of the furniture of the house and is movable property, but the frames, if embedded in the walls or floor are to be considered immovable, and hence they should not be dug up and removed. **A. I. R. 1930 Pat. 387 = 11 P. L. T. 878 = 31 Cr. L. J. 937 = 125 I. C. 784.**

2. Sub-section (2).—Attachment of property in a district other than that of the issuing Magistrate, without the endorsement of the District Magistrate within whose district the property is situate, is illegal. **A. I. R. 1930 Pat. 347 (1) = 11 P. L. T. 402 = 31 Cr. L. J. 494 = 123 I. C. 397.**

3. Sub-section (3). Can Joint family property be seized in attachment? [P. 123, n. 9]—See note 2 to s. 386.

SECTION 89.

Note.—Scope of the Section [P. 126, n. 2].—The applicant for restoration of property under this section has to prove (1) that he has not absconded or concealed himself for the purpose of avoiding execution of the warrant and (2) that he had no proper knowledge of the proclamation. The Magistrate has no jurisdiction to order restoration on any other grounds such as the proclamation itself being irregular or illegal. **A. I. R. 1934 Lah. 987 = 36 P. L. R. 262 = 133 I. C. 954 = 1934 Cr. C. 1391.**

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY
AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

SECTION 94.

Notes.—1. What documents or things may be directed to be produced [P. 129, n. 2].—The accused stole a blank cheque form, forged the complainant's signature, withdrew a sum of money and deposited a portion of it in Savings Bank account with another Bank. During the course of investigation the Magistrate passed an order under this section calling upon the Bank to produce in Court the amount so deposited by the accused and on the Bank failing to do so issued a search warrant for "the amount of Rs. 4,000." It was held

that the order was illegal. Though the language of s. 94 is very wide, the Court's discretion must be exercised judicially. In this case neither the accused nor the complainant could possibly have any right to any particular sum of money in the Bank. The accused had only an actionable claim against the Bank for Rs. 4,000. The money was not part of the proceeds of the alleged offence, and had no connection with the subject-matter at all. Whether the accused was convicted or acquitted it had to be returned to the owner, *i.e.*, the Bank. 58 B. 152.

2. Whether accused can apply for production of document, etc., under this section before charge is framed.—There is nothing in this section which restricts the use of its provisions to any particular stage of an inquiry or trial. S. 257 neither controls nor imposes any limitation on the power of the Court in exercising its discretion in using the machinery provided by this section. It is no bar to the exercise of that discretion in a trial under the provisions of Chapter XXI before the trial has reached the stage of framing a charge. In proper cases the Court would be justified in acting under this section and calling for the production of any document at the request of the accused even though no charge had yet been framed. A. I. R. 1935 Sind 13 (F. B.) = 154 I. C. 762 = 1935 Cr. C. 124.

3. Court may allow inspection of document or thing produced [P. 130, n. 8]—The jurisdiction of the Court to order the production of a document or thing carries with it the jurisdiction to allow the right of inspection. A. I. R. 1935 Sind 13 (F. B.) = 154 I. C. 762 = 1935 Cr. C. 124.

SECTION 96.

Notes.—1. How far this section is governed by s. 94.—The first and second clauses of sub-section (1) relate back to s. 94, *i.e.*, a Magistrate can issue a warrant only in cases in which he might have issued a summons under s. 94. But the third clause giving power to the Court to issue a search warrant if it considers that the purpose of any inquiry, trial or other proceedings under the Code will be served by a general search, is independent of s. 94. 36 Bom. L. R. 96 = A. I. R. 1934 B. 104 = 35 Cr. L. J. 1024 = 149 I. C. 1021 = 1934 Cr. C. 364.

2. Search Warrants may be issued before any proceedings are initiated [P. 133, n. 5]—There need not be a proceeding actually pending before the Magistrate at the time he issues the warrant. A warrant may be issued for the purpose of an inquiry about to be made. 36 Bom. L. R. 96 = A. I. R. 1934 B. 104 = 35 Cr. L. J. 1024 = 149 I. C. 1021 = 1934 Cr. C. 364.

3. Warrant may be issued only for the purposes of inquiry under the Code.—A warrant cannot be issued for the purposes of an inquiry otherwise than under the Code. A warrant therefore cannot be issued for the seizure of records and their delivery to the Customs Authorities for inquiry by them into a non-cognizable offence. 36 Bom. L. R. 96 = A. I. R. 1934 B. 104 = 35 Cr. L. J. 1024 = 149 I. C. 1021 = 1934 Cr. C. 364.

SECTION 99-A.

Amendment.—In sub-section (1)—

(a) after the words "seditious matter" the words "or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects" shall be inserted; and

(b) after the word and figures "section 124-A" the words and figures "or section 153-A" shall be inserted,—**Act XXXVI of 1926.**

In sub-section (1) after the words "His Majesty's subjects" the words "or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious beliefs of that class" shall be inserted and after the figures and letter "153-A" the words, figures and letter "or section 295-A" shall be inserted,—**Act XXV of 1927.**

Notes.—1. Document containing seditious matter.—Where the contents of the document standing by itself was on the border line and two views of it were reasonably possible, the person against whom the proceedings are taken must have the benefit of that which is most favourable to him. 52 A. 775 (F. B.)

2. **Whether section applies to advertisement of a seditious book.**—Though an advertisement may be intimately connected with the book, where the contents of the advertisement did not themselves afford sufficient basis for an order of forfeiture, action cannot be taken under this section in respect of such an advertisement. 52 A. 775 (F. B.)

SECTION 99-B.

Amendment.—For the words “seditious matter” the words “seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A” shall be substituted,—**Act XXXVI of 1926.**

Note.—Onus of proof (P. 139)—The question of onus of proof, is, after both parties have been fully heard, of very little or no practical importance. But it is manifestly most convenient that the Government Advocate should begin and state the case in support of the Local Government's orders. 52 A. 775 (F. B.)

SECTION 99-D.

Amendment.—In sub-section (1) for the words “seditious matter of the nature” the words “seditious or other matter of such a nature as is” shall be substituted,—**Act XXXVI of 1926.**

SECTION 99-E.

Amendment.—For the words “which are alleged to be seditious matter” the words “in respect of which the order of forfeiture was made” shall be substituted,—**Act XXXVI of 1926.**

SECTION 103.

Notes.—1. Object of the section.—The object of the section is to obtain as reliable evidence as possible of the search and to exclude the possibility of any concoction or malpractice of any kind. A. I. R. 1930 C. 141 = 50 C. L. J. 518 = 31 Cr. L. J. 667 = 124 I. C. 436 = 1930 Cr. C. 141.

2. **Section applies only to searches made under the Code [P. 141, first note]**—This section in terms only applies to searches to be made under the Code. Searches under the Bombay Prevention of Gambling Act, for example need not conform to the provisions of this section. A. I. R. 1932 B. 610 = 34 Bom. L. R. 901 = 33 Cr. L. J. 738 = 139 I. C. 281 = 1932 Cr. C. 863. A search under the Public Gambling Act (1867) is not covered by the provisions of this section. 9 Luck. 355. This section does not apply to searches under the U. P. Gambling Act, 1867. A. I. R. 1929 A. 937 = 1930 A. L. J. 229 = L. R. 11 A. (Cr.) 21 = 31 Cr. L. J. 35 = 120 I. C. 266 = 1929 Cr. C. 665 = 13 A. I. Cr. R. 133.

3. **Section does not apply to search of person.**—This section applies only to search of places and not to search of persons. An order cannot therefore be made to certain of the inhabitants of a locality directing them to remain at a place in the road until the suspected person should arrive and then to witness the search of his person. A. I. R. 1933 Nag. 99 = 29 N. L. R. 67 = 34 Cr. L. J. 721 = 144 I. C. 240 = 1933 Cr. C. 364.

4. **Who are proper witnesses [P. 141, n. 2 and p. 142, n. 3]**—It is undoubtedly the duty of the prosecution to see that the witnesses were respectable inhabitants of the locality. But it is not an inflexible rule that in cases where the search witnesses do not satisfy the provisions of this section the whole proceedings should be quashed. Each case must be decided upon its own facts and circumstances and if there is the slightest apprehension that the accused might have been the victim of a piece of chicanery or sharp practice on the part of any member of the raiding party a Court of Justice must give him the full benefit of it and set aside his conviction. A. I. R. 1933 Lah. 809 = 34 P. L. R. 639 = 34 Cr. L. J. 723 = 144 I. C. 290 = 1933 Cr. C. 1026.

The gist of this section is that there must be respectable search witnesses. The stress is on the word "respectable" and not on the word "locality." Where the respectability of the witnesses is not challenged, the failure or inability of the police-officer to secure search witnesses from the locality is no more than an irregularity. 10 Pat. 821; A. I. R. 1934 Sind 159 = 28 S. L. R. 41 = 1934 Cr. C. 1261. But the mere fact that the witnesses were not local people is an irregularity which could be cured under s. 537. A. I. R. 1932 B. 610 = 34 Bom. L. R. 901 = 33 Cr. L. J. 733 = 139 I. C. 231 = 1932 Cr. C. 868. The word "locality" is a comprehensive word and may well include villages within three or four miles of the village where the search is to be conducted. The police may experience difficulty in finding respectable persons in the immediate vicinity. 8 Luck. 472; 9 Luck. 355. But where respectable persons can be found in the neighbourhood, and the police-officer making a search takes with him persons whose respectability is questionable or who come from a distant locality, the inference is that he was prompted by a desire to have such witnesses as would be easily persuaded to support any story which he might put forward. A. I. R. 1934 A. 374 = 1934 Cr. C. 438.

5. Search witnesses must actually witness the search.—It is not a sufficient compliance with the section that the witnesses should merely be summoned and kept present outside the building while the search is going on and then called in to see what has been found. But if the accused has not been prejudiced, the irregularity, will not vitiate the proceedings. 54 B. 471.

6. Duty of prosecution to call witnesses present at search [P. 142, n. 8]—Putting in panchnamas signed by panchas as part of the evidence of the police-officer is worthless, except to corroborate the evidence of the officer that panchas were employed and to show that the provisions of sub-sections (1) and (2) have been complied with. If the evidence of the panchas is to be relied upon, the panchas must be called and the accused must have an opportunity of cross-examining them. The last words in s. 103 (2) do not negative this right. A. I. R. 1932 B. 181 = 34 Bom. L. R. 267 = 33 Cr. L. J. 389 = 136 I. C. 868 = 1932 Cr. C. 240 = 18 A. I. Cr. R. 4.

In 11 Pat. 807 it was however held, not approving the decision in 9 C. W. N. 438, that failure to call the search witnesses does not render the evidence as to the search unreliable in view of sub-section (2) of this section. The statute, in short, lays it upon the prosecution to explain why it desires the search witnesses to be called and not to explain why it does not call the search witnesses.

7. Evidence other than search list and of the search witnesses may be adduced to prove particulars of search [P. 143, n. 11]—The search list and search witnesses should invariably be produced by the prosecution. But the prosecution can prove the recovery of the incriminating article by other evidence as well. A. I. R. 1932 A. 185 = 1932 A. L. J. 104 = L. R. 13 A. (Cr.) 66 = 140 I. C. 246 = 33 Cr. L. J. 943 = 1932 Cr. C. 201 = 17 A. I. Cr. R. 370.

8. Effect of irregularity in search.—Irregularity in a search and the failure to obtain warrant would always afford ground for scrutiny, but if after close scrutiny, the Court comes to the conclusion that the articles were recovered from the possession of the accused, the conviction would be sound. A. I. R. 1932 A. 185 = 1932 A. L. J. 104 = L. R. 13 A. (Cr.) 66 = 1932 Cr. C. 201 = 17 A. I. Cr. R. 370 = 140 I. C. 246 = 33 Cr. L. J. 943; 11 Rang. 107; A. I. R. 1934 A. 873 = 1935 A. L. R. 19 = L. R. 15 A. (Cr.) 110 = 153 I. C. 472 = 1934 Cr. C. 1082 = 21 A. I. Cr. R. 309; 54 B. 471.

9. Searches under other Acts—The Excise Act.—Where the rule provides that the search of the constables and the search witnesses should be carried out before entering the house, the rule ought never to be neglected especially in view of the fact that an informer under the Excise Act obtains a substantial reward for information leading to a conviction and there is a great temptation for him acting in conjunction with the police constables, to plant excisable articles in the house. 55 A. 557.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

SECTION 106.

Notes.—1. “Offence punishable under s. 149” [P. 144, n. 1-A]—S. 149, I. P. C. does not speak of any offence punishable under that section. The meaning is that s. 106, Cr. P. C. has no application to cases where a person has been convicted of a substantive offence read with s. 149, I. P. C. the principle being that where a person is made constructively liable for an offence by calling in the aid of s. 149, I. P. C. it is not proper to take action against him under s. 106, Cr. P. C. **A. I. R. 1934 Oudh 279 = 11 O. W. N. 992 = 1934 O. L. R. 658 = 35 Cr. L. J. 1159 = 150 I. C. 945 = 1934 Cr. C. 775.**

2. It is desirable that Magistrates should record reasons for requiring bond.—The Magistrate is not bound to take security from a person convicted of an offence involving a breach of the peace. He must be of opinion that it is necessary to do so. The law does not provide that the Court shall record its reasons for forming that opinion. But there is no doubt that it is desirable for the Court to do so in order that an Appellate Court may be in possession of the reasons, if they are not apparent on the face of the record. **55 A. 850.**

3. What are offences involving a breach of the peace [P. 146, n. 9]—The clause includes not only offences of which a breach of the peace is a necessary ingredient and in which a breach of the peace has actually occurred, but includes also cases of offences in which an evident intention to commit a breach of the peace is expressly found. **59 C. 659.** Unless the offence is one which necessarily involves a breach of the peace there must be an express finding that the offence did in fact involve a breach of the peace. **A. I. R. 1930 C. 646 = 34 C. W. N. 988 = 1930 Cr. C. 1038.** Even if the words “involving a breach of the peace” are to be given a wide interpretation, there must be an express finding to the effect that the act involves a breach of the peace or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case. **A. I. R. 1932 Sind 87 = 26 S. L. R. 18 = 1932 Cr. C. 383 = 139 I. C. 130 = 33 Cr. L. J. 713 = 18 A. I. Cr. R. 415.** An offence under s. 324, I. P. C. obviously involves a breach of the peace and it is immaterial whether the Magistrate records a formal finding to that effect or not. **13 Lah. 336.** The words “assault or other offence involving a breach of the peace” conveys that the offence of assault did involve a breach of the peace and *a fortiori* the offence of actually causing hurt under s. 323, I. P. C. must also involve a breach of the peace. The offence itself is a breach of the peace whether it takes place in a private room or in the open street. Breach of the peace does not necessarily mean breach of the public peace. If a Magistrate finds that an offence under s. 323, I. P. C. is committed, it is not therefore necessary for him to find separately that a breach of the peace was involved. **55 A. 850 ; 9 Luck. 272 ; (1934) M. W. N. 243 ; (1934) M. W. N. 562.** Where the incidents which form the transaction do in themselves come within the terms of this section, *e.g.*, forming an unlawful assembly and thereby to overawe and intimidate other persons, preventing them from doing what they are legally entitled to do and compelling them to abandon their property which they are entitled to keep, amounts to a serious breach of the peace and an order under this section would be justified. **A. I. R. 1931 Pat. 337 (2) = 131 I. C. 539 = 32 Cr. L. J. 739 = 12 P. L. T. 556 = 1931 Cr. C. 785 = 16 A. I. Cr. R. 349.** An offence punishable under s. 504, I. P. C. involves only an intention to provoke a breach of the “public peace” or knowledge that the provocation given is likely to cause a breach of the “public peace.” Such an offence cannot be said to be one involving a breach of the peace. **7 Luck. 573 ; A. I. R. 1930 C. 802 = 34 C. W. N. 651 = 1930 Cr. C. 1087 = 32 Cr. L. J. 359 = 129 I. C. 413.**

SECTION 107.

I.—CIRCUMSTANCES UNDER WHICH PROCEEDINGS MAY BE TAKEN UNDER THIS SECTION.

Notes.—1. Breach of the peace must be imminent [P. 150, n. 4]—The object of the section is not to punish persons for anything they might have done in the past, but to prevent them from doing something which is likely to occasion a breach of the peace or disturbance of public tranquility in the immediate or near future. These proceedings are intended to be preventive and not punitive. It is therefore

incumbent on the prosecution to give clear proof of acts or specific conduct on the part of the person proceeded against from which a reasonable immediate inference could be drawn that a breach of the peace or disturbance of public tranquility is likely. 12 Lah. 457; A. I. R. 1931 Lah. 184 = 1931 Cr. C. 304 = 131 I. C. 205 = 32 Cr. L. J. 693 = 16 A. I. Cr. R. 310; A. I. R. 1932 Lah. 101 = 33 P. L. R. 370 = 1932 Cr. C. 121. It need not always be necessary to prove also an overt act towards a breach of the peace in respect of any of the accused. 52 A. 593.

II.—DOING A WRONGFUL ACT.

2. Party acting within right ought not to be called upon to give security [P. 152, n. 14]—The fact that a person does a lawful act in a lawful manner and even if by so doing he has injured the susceptibilities of a person of a different faith would not in itself be sufficient to warrant proceedings under this section. A. I. R. 1929 Lah. 138 = 31 Cr. L. J. 75 = 120 I. C. 427; A. I. R. 1932 Lah. 101 = 33 P. L. R. 370 = 1932 Cr. C. 121. If a rightful act causes tension likely to lead to a breach of the peace, the doers of that act cannot be placed on security. A. I. R. 1933 Lah. 36 = 33 P. L. R. 935. But if a legal right is exercised in an unlawful manner as by a show of force, action under this section is proper. A. I. R. 1934 Oudh 179 = 11 O. W. N. 501 = 1934 O. L. R. 391 = 35 Cr. L. J. 809 = 148 I. C. 899 = 1934 Cr. C. 575. When the acts of one party have been lawful and provoked by the unlawful acts of the other party, there is no justification for taking proceedings against both parties. A. I. R. 1929 M. 842 = 2 M. Cr. C. 287 = 30 Cr. L. J. 931 = 118 I. C. 504 = 1929 Cr. C. 610.

III.—BREACH OF THE PEACE LIKELY TO ARISE FROM DISPUTES RELATING TO IMMOVABLE PROPERTY.

3. Jurisdiction under this Chapter not ousted by Chapter XII [P. 153, n. 15]—The District Magistrate has a discretion in respect of which of the powers conferred on him to ensure the peace of the district, he should exercise in a particular case and the High Court should not interfere with his discretion, provided the action he is taking is not illegal or definitely improper. Where action under s. 107 is not improper the proceedings should not be started even if it should be possible to predicate later on that a proceeding under s. 145 might eventually give better results. A. I. R. 1934 Pat. 463 = 152 I. C. 1050 = 1934 Cr. C. 1059.

4. Section not to be used to give possession of immovable property to one of two contending parties [P. 153, n. 16]—The Court might take possession of the property in dispute under s. 145, but it is not entitled to do so under this section with the intention of giving possession to the party found entitled. A. I. R. 1934 Nag. 142 = 30 N. L. J. 298 = 35 Cr. L. J. 991 = 149 I. C. 429 = 1934 Cr. C. 571.

IV.—JURISDICTION OF MAGISTRATES IN RESPECT OF PROCEEDINGS UNDER THIS SECTION.

5. Magistrate cannot call on a person residing outside his jurisdiction to furnish security [P. 154, n. 28]—A Sub-divisional Magistrate has no jurisdiction to initiate proceedings under this section against a person residing outside his jurisdiction. Under Cl. (2) either the person informed against or the place where the breach of the peace or disturbance is apprehended must be within the local limits of his jurisdiction. A. I. R. 1935 Pat. 131 (1) = 154 I. C. 873.

6. What is meant by "unless the person is within the jurisdiction" [P. 154, n. 24]—The section makes no reference to the residence of the persons proceeded against. All that it provides is that if such persons "are" not within the jurisdiction of the Magistrate, his jurisdiction is ousted. A person may be within the limits of a Magistrate's jurisdiction and yet may not have residence within such limits. At the same time, to hold that a person "is" within the local limits of a Magistrate's jurisdiction only because he is present in Court when the Magistrate draws up his order under s. 112, having appeared in obedience to a summons issued by the Magistrate, is to make the section nugatory. If the person informed against is not within the local limits of the Magistrate's jurisdiction when the proceedings are to be initiated, he has no jurisdiction. 54 A. 341. But even a stay for a day will be sufficient to give the Magistrate jurisdiction. 39 M. L. W. 215 = A. I. R. 1934 M. 255 = (1934) M. W. N. 404 = 1934 M. Cr. C. 87 = 66 M. L. J. 420 = 35 Cr. L. J. 626 = 148 I. C. 226 = 1934 Cr. C. 475.

7. On transfer, Magistrate has jurisdiction to draw up proceedings against other persons also [P. 155, see n. 28]—On a police report proceedings were started by the Sub-divisional Magistrate against certain

persons. The District Magistrate transferred the cases to the Deputy Magistrate. The Deputy Magistrate after going through the police report drew up fresh proceedings against a number of others mentioned in the report; *held* he had jurisdiction to do so. 59 C. 1484.

8. How far the principle of *autrefois acquit* is applicable [*P.* 155, *n.* 30-B]—The events which have been the subject of judicial pronouncements should not be made the ground of fresh proceedings under s. 107. *A. I. R.* 1929 *M.* 842 = 2 *M. Cr. C.* 287 = 30 *Cr. L. J.* 931 = 113 *I. C.* 504 = 1929 *Cr. C.* 610.

9. Power cannot be delegated to arbitrator.—A Magistrate could not delegate his power to make an order under this section to arbitrators. *A. I. R.* 1931 *Pat.* 92 = 130 *I. C.* 810.

10. Can the Magistrate send the petition to the police for inquiry and report?—A petition under this section is no doubt not a complaint and therefore the Magistrate cannot proceed under ss. 202 and 203 of the Code. But there is no justification for holding that the Magistrate cannot independently of those sections refer the matter to the police for inquiry and report. In acting under ss. 107, 108, 109 or 110 the Magistrate does not, so long as he does not record an order under s. 112, act judicially. The proceedings become judicial only from the stage of inquiry under s. 117. It follows therefore, that apart from the provisions of s. 202, a Magistrate proceeding under Ch. VIII has the right to call for a report from the police before issuing notice under s. 112. 54 *A.* 1036.

11. Crown has the right to conduct the case after issue of notice.—When notice is issued under s. 112, the Crown has the right to conduct the case against the person asked to show cause. S. 495 also gives the Magistrate discretion to permit the case to be conducted by any person mentioned therein. 54 *A.* 1036.

VI.—SCOPE OF SUB-SECTIONS (3) AND (4).

12. Jurisdiction to remand person into custody—Right of person arrested, to bail [*P.* 155, *n.* 34]—A person proceeded against under this section, is, as of right, entitled to bail. If the Magistrate considers that immediate measures are necessary for the prevention of a breach of the peace during the pendency of the inquiry, he could direct the person to execute a bond for keeping the peace until the completion of the inquiry. *A. I. R.* 1933 *Rang.* 165 = 34 *Cr. L. J.* 1195 = 146 *I. C.* 23 = 1933 *Cr. C.* 764; *A. I. R.* 1933 *Rang.* 164 = 34 *Cr. L. J.* 950 = 145 *I. C.* 344 = 1933 *Cr. C.* 763.

SECTION 108.

Note.—What is required to be proved under this section.—It must be shown that there is danger of the person continuing his seditious activities unless he is prevented from doing so under this section. It may fairly be assumed that a person who habitually does something is likely to continue to do so, but then the habitual nature of his activities must be clearly proved. *A. I. R.* 1932 *Lah.* 7 = 134 *I. C.* 486 = 32 *Cr. L. J.* 1172 = 1932 *Cr. C.* 17. The words “disseminates or attempts to disseminate” refer not to the number of acts performed but rather to whether the evidence showed that there was something to show that a repetition of the offence was probable. This depends on the facts of each case. *A. I. R.* 1932 *Pat.* 213 = 13 *P. L. T.* 275 = 1932 *Cr. C.* 494 = 139 *I. C.* 88 = 33 *Cr. L. J.* 711. The provisions of the section could not be applied in respect of an isolated speech made on a special occasion and at a meeting for a special purpose. There must be evidence of the person having made any other objectionable speech in the past or of his having an intention of doing so in the future. 9 *Luck.* 344.

SECTION 109.

Notes.—1. “Taking precautions to conceal his presence” [*See p.* 159, *n.* 8-A]—The expression “taking precautions to conceal his presence” is equivalent to taking precautions to conceal the fact that he is present. The precautions may take the form of (a) concealing himself or (b) concealing his identity. Concealment of one’s identity however cannot mean the same as concealment of one’s presence. The object in each case might be quite different. Where a man of small status posed himself as the Raja of a big State in order to facilitate his cheating other people, the mere concealment of his real identity would not have helped him to cheat others until he attempted to assume the identity of the Raja. The concealment of his real identity was no part of his criminal objective and cl. (a) of this section is not applicable to such a case. 55 *A.* 314.

Where the accused when questioned, gave correct information as to their names and addresses they cannot be said to be concealing their presence within the meaning of s. 109. 50 C. L. J. 181 = A. I. R. 1929 C. 729 = 1929 Cr. C. 365. The section refers to a person concealing the fact of his infesting the Magistrate's jurisdiction and not to concealing himself as one who hides from a policeman. In the former case if there is reason to believe that that is a precaution taken with a view to commit an offence, the Magistrate can require him to give security. 57 C. 949.

The words "is taking" in cl. (a) mean "has taken" or "has been taking." Otherwise no action can be taken against a man after he has been arrested and the arrest itself will become futile. A. I. R. 1935 Pat. 69 = 15 P. L. T. 836 = 1935 Cr. C. 139.

2. **Concealment must be within local limits of Magistrate's jurisdiction.**—Clause (a) does not mean that the man is taking precautions to conceal the fact of his being present within the local limits of the Magistrate, but it means that he is taking precautions to conceal his presence and that the concealment is to be within the local limits of such Magistrate. A. I. R. 1935 Pat. 69 = 15 P. L. T. 836 = 1935 Cr. C. 139; 50 A. 909 (F. B.)

3. **Single act of taking precaution to conceal presence sufficient—conduct need not be continuous.**—It is not necessary in order to bring a person within the operation of cl. (a) to show that he has followed a continuous course of conduct in taking precautions to conceal his presence. Otherwise it would be impossible to take action against any person however bad his character or intention to commit an offence may be, if his attempt at concealment were confined to a solitary instance. A. I. R. 1934 Oudh 367 = 11 O. W. N. 935 = 1934 O. L. R. 705 = 35 Cr. L. J. 1272 = 151 I. C. 286 = 1934 Cr. C. 1058; A. I. R. 1930 Pat. 497 = 31 Cr. L. J. 1125 = 126 I. C. 855 = 1930 Cr. C. 925. In A. I. R. 1929 C. 729 = 50 C. L. J. 181 = 1929 Cr. C. 365 it was held that s. 109 (a) refers to the case of a continuous act and not to the case of an isolated effort at concealment.

4. **Meaning of "give a satisfactory account of himself"** [P. 158, n. 6]—The words "a satisfactory account of himself" do not necessarily mean that the person should give his correct name and address or even the object of his being present at the particular place and time, but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him. To hold otherwise would mean that if a person be found by the police with implements of housebreaking near the house of a wealthy man, thereby indicating that he is about to commit burglary there, and when challenged by the police he gives his name and address and admits the object of his being there, no action can be taken against him. Such a man is certainly liable to be dealt with under s. 109 and he comes under both clauses (a) and (b). A. I. R. 1935 Pat. 69 = 15 P. L. T. 836 = 1935 Cr. C. 139.

5. **Sureties may be proceeded against even after one year if bond was forfeited within the period.**—If the bond was forfeited on account of any act of the accused person within the period for which the sureties had bound themselves, they would be liable whether the proceedings were started against them before or after the expiry of the period. 54 A. 335.

SECTION 110.

Notes.—1. Magistrates specially empowered [P. 160, n. 2]—A general order empowering First Class Magistrates to proceed under this section, is lawful. A. I. R. 1933 A. 676 = 1933 A. L. J. 777 = L. R. 15 A. (Cr.) 13 = 35 Cr. L. J. 218 = 146 I. C. 900 = 1933 Cr. C. 1188 = 21 A. I. Cr. R. 13.

2. **Non-prosecution for substantive offence no bar to action under this section.**—The mere fact that there may be some reason to suppose that the accused have committed some substantive offence under the Penal Code is no obstacle for the institution of proceedings under this section. A. I. R. 1933 A. 676 = 1933 A. L. J. 777 = L. R. 15 A. (Cr.) 13 = 35 Cr. L. J. 218 = 146 I. C. 900 = 1933 Cr. C. 1188 = 21 A. I. Cr. R. 13; 52 A. 446; A. I. R. 1933 Oudh 251 = 10 O. W. N. 325 = 34 Cr. L. J. 852 = 144 I. C. 944 = 1933 Cr. C. 857.

I.—PERSONS OVER WHOM JURISDICTION MAY BE EXERCISED.

3. **Person must be within the local limits of Magistrate's jurisdiction** [P. 160, n. 8]—It is plain from the language of s. 110 itself that residence within the jurisdiction is not meant. If the Legislature had intended to confine the operation of the section to persons residing within the local limits of the Magistrate's jurisdiction it would have said so in plain language. A. I. R. 1931 C. 65 (1) = 52 C. L. J. 415 = 35 C. W. N. 255 = 129 I. C. 688 = 32 Cr. L. J. 425 = 1931 Cr. C. 64 = 15 A. I. Cr. R. 453. If the person had resided within the jurisdiction of

the Magistrate and habitually committed thefts and disposed of stolen property within that jurisdiction the fact that he absconded and was brought back by the police from another taluk does not oust the jurisdiction of the Magistrate. 23 S. L. R. 438 = 30 Cr. L. J. 849 = 117 I. C. 777 = 1929 Cr. C. 335 = A. I. R. 1929 Sind 166.

II.—CONDUCT COMING WITHIN THE PURVIEW OF THIS SECTION.

4. **Person who is by habit a robber, house-breaker or thief or forger.**—To prove that a person is a habitual thief and burglar it is not enough if a witness should state that he is a "bad character." But if the witness should further state that the person habitually commits theft, then there is no ambiguity and the evidence is admissible as evidence of general reputation. 51 A. 275. To prove that a man is by habit a thief under cl. (a) evidence can no doubt be led of his general reputation about the matter and evidence that he was suspected in a particular case by a particular person or by the police of having committed a theft. But there must be a large number of such cases before it can be held proved on this evidence alone that he is by habit a thief. A. I. R. 1930 Lah. 345 = 32 Cr. L. J. 62 = 127 I. C. 861 = 1930 Cr. C. 393.

5. **What amounts to habitually harbouring thieves, etc.** [P. 161, n. 12]—It is not enough to prove that the person helped accused persons in one or two cases, but that he is in the habit of protecting thieves as such. One or even two cases perhaps may not be sufficient to prove habit and character, but a number of similar incidents cease to be isolated facts and become evidence of habit and character. How many such facts should be proved depends on the circumstances of each case. A. I. R. 1933 Pat. 189 = 14 P. L. T. 482 = 143 I. C. 687 = 34 Cr. L. J. 643 = 1933 Cr. C. 520.

6. **Person of desperate and dangerous character** [P. 162, n. 16]—A man of "desperate and dangerous character" means a man who has reckless disregard of the safety of persons and the property of his neighbours. 61 C. 588. Where a person was found to be quarrelsome, to have threatened members of the Municipal Board for having ordered the closure of his shop and to have thrown bricks into people's houses or on the streets, held that this does not make him a dangerous or desperate character though it may arouse suspicion of his sanity. A. I. R. 1931 A. 437 = L. R. 12 A. (Cr.) 92 = 32 Cr. L. J. 1070 = 133 I. C. 535 = 1931 Cr. C. 709 = 16 A. I. Cr. R. 26. If the accused are proved by evidence to be members of a secret society the purpose of which is to cause a revolution by the use of bombs, pistols and other forms of violence, proceedings under this section can legally be taken against them. A. I. R. 1933 A. 676 = 1933 A. L. J. 777 = L. R. 15 A. (Cr.) 13 = 35 Cr. L. J. 218 = 146 I. C. 900 = 1933 Cr. C. 1188 = 21 A. I. Cr. R. 13; A. I. R. 1933 A. 674 (1) = 1933 Cr. C. 1186 = 146 I. C. 1070.

See General Notes to the Chapter "Evidence" at p. 21, *infra*.

SECTION 112.

See General Notes to the Chapter—Preliminary Order and its Contents, at p. 19, *infra*.

SECTION 117.

Notes.—1. Sub-section (2)—Summoning of witnesses.—Ordinarily the person proceeded against under this chapter and ordered to give security for good behaviour is entitled to have his witnesses summoned at Government expense as in warrant cases unless the Magistrate for reasons to be recorded declines under s. 257 (1) to summon all or any of the witnesses named by the person concerned. A. I. R. 1932 Lah. 577 = 138 I. C. 765 = 33 P. L. R. 742 = 33 Cr. L. J. 679 = 19 A. I. Cr. R. 39 = 1932 Cr. C. 805.

2. **No Charge need be framed.**—These words can only mean that no occasion can arise for framing a charge, because under s. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the "order in writing setting forth the substance of the information received" prescribed by s. 112. 53 M. 173 (F. B.)

3. **Sub-section (3)—High Court's power to reduce interim security.**—The provisions of Ch. XXXIX relating to bail do not apply to an order under s. 117 (3). The security cannot therefore be reduced by the High Court under s. 498. But the High Court may in the exercise of its inherent powers reduce the interim security demanded under this sub-section, if it finds it to be too high; but any such reduction will not in any way affect the amount of security that the persons may be finally required to give. A. I. R. 1930 Lah. 529 = 31 Cr. L. J. 812 = 125 I. C. 322 = 1930 Cr. C. 677.

SECTION 118.

See General Notes to the Chapter—Final Order, at p. 22, *infra*.

SECTION 120.

Note.—Period of release on bail pending appeal must be excluded from imprisonment.—There is no provision in any section of the Code that a person ordered to furnish security under this chapter should have the period for which he was on bail pending his appeal excluded from the period for which he is to be detained in jail. S. 426 allowing an Appellate Court to release a person on bail pending the hearing of the appeal only refers to convicted persons. Though sub-sec. (3) of that section providing for the exclusion of the period for which the accused was on bail does not apply to persons imprisoned under s. 120 as they are not convicted persons, s. 426 may be applied to such cases by analogy. Whether or not that section applies, the general principles of Criminal law require that the period during which the person was released on bail must be excluded from the period for which he was required to undergo imprisonment on failure to give security. **A. I. R. 1934 A. 845 = 4 A. W. R. 76 = 1934 A. L. R. 1043 = 36 Cr. L. J. 177 = 152 I. C. 785 = 1934 Cr. C. 1031.**

SECTION 121.

Note.—What constitutes breach of the bond [*P. 167, note*].—A breach of the bond is committed when the accused commits, or attempts to commit or abets any offence punishable with imprisonment. The mere fact that he is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself which may justify a fresh proceeding against him under s. 109 would not result in the forfeiture of the bond, because that does not amount to the commission or attempt to commit or abetment of an offence though it might be the preparation for the commission of an offence, but short of an attempt. **54 A. 335.**

SECTION 123.

Notes.—1. Sub-section (2)—Sentence commences from date of Magistrate's order.—Where a person is ordered by the Magistrate to be detained in prison pending the orders of the Sessions Judge, such person must be considered to be undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained in custody. The sentence awarded by the Sessions Judge should be deemed to have commenced from the date of the Magistrate's order and not from the date of the order of the Session's Judge. **7 Luck. 219 following 30 A. 334 (F. B.)**

2. Notice must be given to person directed to furnish security [*P. 169, n. 6*].—The person affected by the order must have an opportunity of being heard before the final order is made under this section. **12 Pat. 770.**

3. Judge must pass his own order [*P. 169, n. 7*].—On a reference under sub-section (3) the Sessions Judge has no jurisdiction to direct the Magistrate to pass a fresh order under s. 112 and after complying with the provisions of that section, to try the case *de-novo*. On a reference, the Court of Session or the High Court is acting as a Court of first instance and not as a Court of Appeal. **A. I. R. 1932 Sind 83 = 26 S. L. R. 200 = 1932 Cr. C. 528 = 33 Cr. L. J. 898 = 139 I. C. 783.**

4. Sessions Judge not to accept or reject the sureties offered—[*See P. 170, n. 9*].—The provisions contained in ss. 122, 123 and 406-A make it clear that the power to reject sureties is given to the Magistrate and that there is a right of appeal from an order passed by the Magistrate refusing to accept or rejecting a surety under s. 122 to the Sessions Judge. The clear implication of these provisions taken together is, that the Magistrate is vested with the authority either to accept or reject sureties demandable under s. 110 and it is not open to the Sessions Judge exercising jurisdiction under s. 123 to accept or reject the sureties offered. The course open to the Sessions Judge when sureties are offered is to send the proceedings back to the Magistrate for taking action under s. 122. **61 C. 588; 9 Pat. 741.**

5. Term of imprisonment should generally be same as the period for which security is demanded [*P. 170, n. 12*].—*See* note 18, General Notes to the Chapter at p. 22, *infra*.

GENERAL NOTES TO THE CHAPTER.

I.—OBJECT OF CHAPTER.

Notes.—1. Object of proceedings is prevention of offences, not punishment [*P. 171, n. 1*].—These preventive sections are not intended to be used to punish accused persons for offences that have been committed, but to prevent them from committing offences which they are by their nature or habit likely to commit. *A. I. R. 1933 A. 859 = 1933 A. L. J. 883 = L. R. 14 A. (Cr.) 413 = 147 I. C. 551 = 1933 Cr. C. 1534 = 20 A. I. Cr. R. 348.* Where the particular charge against a person was a definite and specific offence under s. 401, I. P. C. it was *held* that the preventive sections cannot be used in such cases. *A. I. R. 1929 A. 813 = 1929 A. L. J. 981 = L. R. 10 A. (Cr.) 127 = 30 Cr. L. J. 1086 = 119 I. C. 571 = 1929 Cr. C. 449 = 12 A. I. Cr. R. 208.*

II.—POINTS TO BE NOTED BY MAGISTRATES.

2. Procedure laid down must be carefully followed [*P. 173, n. 7*].—When trying a case under s. 110 the Magistrate is required by law to function as a judicial officer and nothing should be done in the trial of such cases to lay the proceedings open to the comment that the Magistrate was both in the position of a prosecutor and a judge. In the trial of such cases, like other cases, the procedure prescribed by law must be faithfully followed, the evidence must be judicially considered and findings based on judicial principles must be recorded. *A. I. R. 1934 A. 785 = 3 A. W. R. 658 = 1934 A. L. R. 948 = L. R. 15 A. (Cr.) 79 = 36 Cr. L. J. 33 = 152 I. C. 120 = 1934 Cr. C. 936 = 21 A. I. Cr. R. 153.*

3. Points to be noted in fixing security [*P. 174, n. 11*].—*Quantum of Security to be demanded*.—The amount of security to be demanded should not be more than what the person bound over may reasonably be expected to furnish. *A. I. R. 1931 C. 18 = 52 C. L. J. 405 = 1931 Cr. C. 50 = 130 I. C. 880 = 32 Cr. L. J. 593 = 16 A. I. Cr. R. 225.* To demand a bond for an amount beyond the means of the person, leaves him no option even if he wanted to furnish security, and practically amounts to sending him to jail under a summary procedure without his having been tried and convicted for an offence. This certainly is not the object of the section. *A. I. R. 1932 Lah. 559 = 33 P. L. R. 911 = 1932 Cr. C. 713 = 139 I. C. 696 = 33 Cr. L. J. 831.* It is certainly preferable that the person should be at large when there is a chance of moderating influences being brought to bear on him than that he should be associating with confirmed criminals in gaol by reason of his inability to furnish security beyond his means. *A. I. R. 1933 A. 674 (2) = 1933 A. L. J. 927 = L. R. 15 A. (Cr.) 9 = 35 Cr. L. J. 183 = 146 I. C. 875 = 1933 Cr. C. 1186 = 21 A. I. Cr. R. 9.*

III.—INFORMATION ON WHICH PROCEEDINGS MAY BE INITIATED.

4. Person to whom notice is issued under s. 112 is not entitled to copy of police report [*See P. 177, n. 17*].—S. 548 provides that if any person affected by the orders of a Criminal Court desires to have a copy of "other part of the record" he shall on applying for such copy be furnished therewith. The record intended is the magisterial record and such record in proceedings under s. 107 begins usually with the order under s. 112 except where a Magistrate not empowered under s. 107 issues a warrant under cl. (3) of that section. The information leading to action under s. 107 may be of the most varied kind and the Magistrate is not bound to disclose the nature or source of such information. Therefore the information or report of the police is not part of the record within the meaning of s. 548 and the person to whom notice is issued is not entitled to a copy of it. *54 M. 422.*

IV.—PRELIMINARY ORDER AND ITS CONTENTS.

5. Order must set forth the substance of the information [*P. 178, n. 19*].—In proceedings under s. 107 merely to reproduce the language of the section without specifying in what way and with reference to what matter the person was likely to commit a breach of the peace and in what way he was likely to do a wrongful act which might occasion a breach of the peace, is vague and cannot be supported. *A. I. R. 1929 Pat. 67 = 10 P. L. T. 639 = 30 Cr. L. J. 492 = 115 I. C. 545 = 12 A. I. Cr. R. 451.* In respect of proceedings under s. 110, ordinarily it is sufficient under that section if that portion of the clause of s. 110 which is applicable to the particular case is specified in the notice. Where the particular clause refers to two or more offences the particular offence or offences which is appropriate to the particular case should also be mentioned in the notice. This applies more particularly to clause (d). *52 A. 448.* That "you possess a bad reputation in the vicinity of your village" or that "you have only a nominal means of livelihood except the proceeds of

burglary and theft" or that "you have been strongly suspected to have committed the following burglaries" is not a proper notice under this section. *A. I. R. 1929 A. 813 = 1929 A. L. J. 981 = L. R. 10 A. (Cr.) 127 = 30 Cr. L. J. 1036 = 119 I. C. 571 = 1929 Cr. C. 449 = 12 A. I. Cr. R. 208.* In a notice under s. 110, it is not proper to refer the party proceeded against, to a police report. The Magistrate should extract and plainly state the facts which in his opinion will, if established by evidence, necessitate the taking of security from the said party. (1933) *M. W. N. 875.* The words "substance of the information" in s. 112 mean with reference to s. 110, such, or so much of the information as would enable the party to know under what clause of s. 110 he is charged or to what particular class of offenders he is said to belong. Even if it be held that it is necessary to give complete information in the notice, the omission at the most is an irregularity under s. 537 and should not vitiate the entire proceedings without proof of prejudice to the accused. *57 C. 503.* The intention is to give in substance an abstract of the facts upon which the Magistrate charges the persons proceeded against so as to give them notice of what they have to meet and be prepared to meet it. *59 M. L. J. 887 = 32 M. L. W. 320 = (1930) M. W. N. 698 = A. I. R. 1930 M. 859 = 3 M. Cr. C. 340 = 32 Cr. L. J. 27 = 127 I. C. 652 = 1930 Cr. C. 1035.*

6. Can the order be amended?—Having regard to the fact that a Court can at any stage of the proceedings amend a charge, by analogy it must have a similar power in the case of a notice under this section, which in many respects is analogous to a charge. (1933) *M. W. N. 551.* But the Court has no power after the order under this section was drawn up and communicated to the accused to alter the period during which the accused is to be of good behaviour. *A. I. R. 1933 Sind 8 = 27 S. L. R. 19 = 34 Cr. L. J. 9 = 140 I. C. 170 = 1933 Cr. C. 32 = 19 A. I. Cr. R. 96.*

Y.—PROCEDURE IN INQUIRY UNDER S. 117.

7. Persons proceeded against must be given a fair opportunity to enter into their defence [*P. 179, n. 27*].—A person who is called upon to furnish security is entitled like other accused persons to have his full say in the matter and there is no warrant in law for calling upon such a person to "examine up to 30 of his best witnesses" thereby playing the rôle of a Judge to decide for himself who are his "best witnesses," and examine only such witnesses. *A. I. R. 1934 A. 735 = 3 A. W. R. 655 = L. R. 15 A. (Cr.) 79 = 1934 A. L. R. 948 = 36 Cr. L. J. 33 = 152 I. C. 120 = 1934 Cr. C. 936 = 21 A. I. Cr. R. 153.*

8. In good behaviour cases procedure for warrant cases shall be adopted [*P. 180, n. 31*].—*Whether s. 256 applies to proceedings under s. 110.*—The person against whom an order is made under s. 112, is fully aware of what is alleged against him and as the evidence of the prosecution witnesses is recorded in his presence he has every opportunity of cross-examining them. There is therefore no reason why he should be allowed the right of a second cross-examination under s. 256. That section therefore does not apply to proceedings under s. 110. *A. I. R. 1933 Rang. 29 = 34 Cr. L. J. 468 = 142 I. C. 752 = 1933 Cr. C. 277.* S. 256 is not applicable to a person called upon to give security for good behaviour but he has a qualified right given by s. 257 of the Code. *A. I. R. 1933 Sind 8 = 27 S. L. R. 19 = 34 Cr. L. J. 9 = 140 I. C. 170 = 1933 Cr. C. 32 = 19 A. I. Cr. R. 96; 53 M. 173 (F. B.)* But in *52 A. 448* it was held that s. 256 was applicable to inquiry into cases under s. 110 so far as practicable.

VI.—JOINT INQUIRY.

9. Generally every person has a right to have his case inquired into separately [*P. 181, n. 38*].—When several persons are jointly proceeded against they should not be treated as if they formed one single individual without discrimination and without an attempt to discover which of them was likely to commit a breach of the peace. *52 A. 593.*

10. Persons associated together may be dealt with jointly [*P. 181, n. 39*].—A joint trial can be held and a joint trial is the proper procedure in the case of persons acting in concert; persons who are associates and confederates, so as to call into operation the provision contained in s. 117 (5). In cases where proceedings are taken jointly against more persons than one, the Magistrate is required to come to separate findings as regards each of the persons charged, individually. *61 C. 588; A. I. R. 1930 C. 294 = 34 C. W. N. 144 = 31 Cr. L. J. 944 = 125 I. C. 855 = 1930 Cr. C. 382.* When a person is in the habit of committing theft in association with

other persons as members of a gang of thieves, the case of all such persons may be dealt with in the same inquiry provided none of the persons concerned were thereby prejudiced in their defence. **12 Rang. 189.** A joint inquiry under s. 117 is legal if evidence of reputation is against all together and not against each accused separately. **54 M. 334.** Where two persons were alleged by the prosecution to be members of a gang of habitual thieves and robbers and were always associated jointly in the commission of thefts, burglaries and robberies, one order can be issued against both of them under s. 112. **A. I. R. 1933 Oudh 251 = 10 O. W. N. 325 = 34 Cr. L. J. 852 = 144 I. C. 944 = 1933 Cr. C. 557 ; A. I. R. 1933 Oudh 195 = 10 O. W. N. 238 = 34 Cr. L. J. 793 = 144 I. C. 577 = 1933 Cr. C. 382.**

VII.—EVIDENCE.

11. There must be evidence before final order can issue [*P. 183, n. 44*].—The object of s. 110 is to offer protection to the public and is not intended to be an engine of oppression. In all cases under ss. 108, 109 or 110 there must be legal evidence on the question of repute. The statements have got to be tested in the light of tangible facts and particulars if there are any such facts to support the story. If there are no such facts, the evidence loses its value. **A. I. R. 1930 A. 37 = 31 Cr. L. J. 301 = 121 I. C. 559 = 1930 Cr. C. 53.** Mere "suspicion" is worthless and inadmissible unless supported by good reasons. **A. I. R. 1929 A. 599 (2) = 1929 A. L. J. 938 = L. R. 10 A. (Cr.) 106 = 30 Cr. L. J. 693 = 116 I. C. 801 = 1929 Cr. C. 174 = 12 A. I. Cr. R. 114.**

12. Nature of Evidence [*P. 183, n. 46*].—In cases where there has been a previous order under section 110 witnesses ought to make it clear in their evidence that their evidence relates to the reputation of the persons proceeded against subsequent to their release from imprisonment. It would be intolerable that on the same evidence as before, suspected persons should continually be sent to jail under that section. **55 A. 404.**

Mere proof of previous conviction not sufficient [*P. 184, n. 46 (g)*].—In the absence of cogent and convincing evidence in proof of the fact that the person is by habit a thief or a house-breaker, his previous conviction several years earlier, cannot by itself be a justification for binding him over under s. 110. **A. I. R. 1934 A. 733 = 3 A. W. R. 655 = 1934 A. L. R. 948 = L. R. 15 A. (Cr.) 79 = 36 Cr. L. J. 33 = 152 I. C. 120 = 1934 Cr. C. 936 = 21 A. I. Cr. R. 153.**

13. Confession of one of the persons proceeded against may be taken into consideration against others.—The word "offence" as used in s. 30, Evidence Act has a wide significance and there is no reason to hold that that section may not be applied to a proceeding under s. 110, Cr. P. C. against a number of persons one of whom has made a confession implicating other persons whose conduct is also the subject of an inquiry. **1934 A. L. J. 1170 = A. I. R. 1934 A. 927 = 4 A. W. R. 42 = L. R. 15 A. (Cr.) 153 = 1934 A. L. R. 1065 = 151 I. C. 881 = 1934 Cr. C. 1246 = 21 A. I. Cr. R. 269.**

VIII.—EVIDENCE OF GENERAL REPUTE.

14. What is general reputation [*P. 186, n. 53*].—Reputation is the sum total of the rumours and talks about a man accepted and believed by those who know him well. The evidence of reputation is made up partly of the belief of the deponent and partly of what he heard from others of their beliefs. The distinction between reputation and rumour is well marked though it may be difficult to say generally where a rumour ends and reputation begins. **A. I. R. 1933 Pat. 189 = 1933 Cr. C. 520 = 143 I. C. 687 = 14 P. L. T. 482 = 34 Cr. L. J. 643.**

15. Admissibility of evidence of general reputation [See *P. 187, n. 55*].—Evidence of general repute does not offend against the rule against reception of hearsay evidence or the provisions of s. 60, Evidence Act. What weight is to be attached to such evidence must depend on the fact whether the witness is independent or impartial, whether he is in a position to disclose the source of his knowledge and whether that source is such as to inspire confidence. **A. I. R. 1934 A. 735 = 3 A. W. R. 655 = L. R. 15 A. (Cr.) 79 = 1934 A. L. R. 948 = 36 Cr. L. J. 33 = 152 I. C. 120 = 1934 Cr. C. 936 = 21 A. I. Cr. R. 153.** Evidence of general repute and character is admissible in cases under this section and specific instances where reasonable suspicion fell upon the accused are good evidence to show the basis of bad reputation. Whether from such instances habit and character can be inferred is a matter to be inferred from the facts of the particular case. The evidence of those who know the man and his reputation is admissible. Evidence of those who do not know the man but have heard of the reputation is not admissible. **A. I. R. 1933 Pat. 189 = 14 P. L. T. 482 = 1933 Cr. C. 520 = 143 I. C. 687 = 34 Cr. L. J. 643 ; 51 A. 275 ; 6 Luck. 36.** Evidence given by police-officers, about the general repute of a person and of association with proved revolutionaries, if it is not merely based on rumour or suspicion, is admissible.

Hearsay evidence does amount to evidence of general repute for the purpose of section 110, provided there is a reasonable foundation for it. *A. I. R. 1933 A. 674 (2) = 1933 A. L. J. 927 = L. R. 15 A. (Cr.) 9 = 35 Cr. L. J. 183 = 146 I. C. 875 = 1933 Cr. C. 1186 = 21 A. I. Cr. R. 9; 51 A. 275.* Reports made by various persons about thefts and burglaries, committed in their houses expressing their suspicions against the person proceeded against could be legitimately used, though not as substantive evidence, to corroborate the evidence of prosecution witnesses. *A. I. R. 1933 Oudh 251 = 10 O. W. N. 325 = 34 Cr. L. J. 852 = 144 I. C. 944 = 1933 Cr. C. 557; A. I. R. 1933 Oudh 58 = 9 O. W. N. 1012 = 34 Cr. L. J. 160 = 1933 Cr. C. 98 = 141 I. C. 251; A. I. R. 1934 Oudh 49 = 11 O. W. N. 84 = 1934 O. L. R. 113 = 147 I. C. 388 = 1934 Cr. C. 290 = 35 Cr. L. J. 403.*

IX.—FINAL ORDER.

16. **What is the nature of the bond contemplated.**—Sections 117 and 118 do not contemplate the furnishing of a registered hypothecation bond, as good security though it would not be improper for a Magistrate in case of doubt to permit a surety who has signed the bond, also to execute a registered bond hypothecating immovable property. What the Code requires is that there should be sureties able to make good the amount. These persons should be reliable and possessed of such status, means or property that the amount would be recovered by seizure of their properties or, if arrested they would make good the amount. Though under s. 514 the Magistrate cannot proceed by attachment and sale of immovable properties when there is a forfeiture of the bond, it would be unfair to accused persons if any general rule of practice were laid down that no person who is not possessed of sufficient movable properties should be accepted as a surety. The Magistrate has to satisfy himself as to the means and station in life of the surety as well as his character. His discretion must not be exercised arbitrarily. The primary consideration is whether the surety is likely to fulfil the undertaking given by him. *1932 A. L. J. 157 = A. I. R. 1932 A. 122 = L. R. 13 A. (Cr.) 8 = 33 Cr. L. J. 229 = 136 I. C. 65 = 1932 Cr. C. 147 = 17 A. I. Cr. R. 98.*

X.—ENFORCEMENT OF FINAL ORDER.

17. **Security cannot be asked till expiry of imprisonment if person ordered to give security has been sentenced to imprisonment** [*P. 191, n. 66*].—Where the accused was sentenced to nine months' imprisonment on 6—6—1934 for an offence under the Criminal Tribes Act and while undergoing that sentence he was ordered to furnish security for good behaviour and on his failure to do so was sentenced to detention in prison for one year, *held* that the order was illegal as under s. 120 (1) the period for which security was required should have commenced from the expiration of the previous sentence of imprisonment. (1935) *M. W. N. 11.* Where a Magistrate convicted the accused for an offence under s. 326, I. P. C. and sentenced him to imprisonment for two years and also required him to furnish security for keeping the peace for three years from the date of the order, *held* the order was clearly opposed to law. (1934) *M. W. N. 1362.*

18. **The period of imprisonment in default of security should be the same as the period for which security is demanded** [*P. 191, n. 68*].—Where a Magistrate ordered the accused to execute a bond under s. 106 to keep the peace for one year and in default to undergo simple imprisonment for three months, *held* that the proper order would be that in default the accused should undergo simple imprisonment for one year or until such date within the year as the required security was furnished. (1933) *M. W. N. 548; A. I. R. 1930 Lah. 49 (1) = 31 Cr. L. J. 583 = 123 I. C. 835 = 1930 Cr. C. 1.* An order of detention under this section amounts to sentencing a person to imprisonment. In the case of an adolescent offender, s. 8 of the Madras Borstal Schools Act, 1926 provides for sending him to a Borstal School in lieu of passing a sentence of imprisonment upon him. The least period of detention that Act provides for, is two years. Therefore, even though the period for furnishing security is only one year, yet when detention in a Borstal School is ordered instead of imprisonment, then, that detention can only be for two years. *57 M. 928.*

XVI —TRANSFER.

19. **Proceedings may be transferred to another Magistrate after preliminary order under s. 112 has been drawn up** [*P. 201, n. 124*].—After a preliminary order under s. 112 has been drawn up by a Magistrate having local jurisdiction, it is open to the District Magistrate to transfer the proceedings to another Magistrate even though the latter may not have jurisdiction over the place where the persons proceeded against were residing. *59 M. L. J. 887 = 32 M. L. W. 320 = (1930) M. W. N. 698 = A. I. R. 1930 M. 859 = 3 M. Cr. C. 340 = 32 Cr. L. J. 27 = 127 I. C. 652 = 1930 Cr. C. 1035.*

XVII.—FURTHER INQUIRY AND RE-INQUIRY.

20. No further inquiry to be ordered when a person is discharged under this chapter [*P. 202, n. 131*]
—A person discharged under section 119 is not an accused person within the meaning of s. 436 and a District Magistrate is not competent to pass an order for further inquiry into the case of such a person. **A. I. R. 1931 Lah. 185 = 31 P. L. R. 350 = 127 I. C. 716 = 32 Cr. L. J. 21 = 15 A. I. Cr. R. 214 = 1931 Cr. C. 305 ; 53 A. 148.**

XVIII.—APPEAL.

21. Appellate Court cannot order re-trial.—On appeal from an order as distinguished from a conviction, the Appellate Court can either alter the order or reverse it under cl. (c) s. 423. An order for fresh inquiry cannot be made. **A. I. R. 1929 Lah. 28 (4) = 30 P. L. R. 416 = 30 Cr. L. J. 491 = 115 I. C. 544 = 12 A. I. Cr. R. 273.** No appeal lies from an order of imprisonment in default of furnishing security passed under s. 123. **13 Rang. 287.**

XIX.—REVISION.

22. High Court will interfere only on strong and clear grounds [*P. 204, n. 141*].—The revisional jurisdiction of the High Court in the case of proceedings under s. 110 is as much unfettered as in other cases coming before it and interference would be called for and justified on a proper case being made out. At the same time, the position cannot be overlooked that the question whether it is necessary in the interest of keeping the peace, to take security from a person is essentially a question which concerns the Magistrate and the local police. The High Court will interfere only on very strong and clear grounds which go to show that there has been in a particular case a miscarriage of justice. **61 C. 588.** In cases under s. 110 it is not the duty of the High Court sitting in revision to weigh the evidence on one side or the other, but only to see whether the Court below approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused. **A. I. R. 1934 Oudh 49 = 11 O. W. N. 84 = 1934 O. L. R. 113 = 1934 Cr. C. 290 = 147 I. C. 338 = 35 Cr. L. J. 403.** The question whether the circumstances in which a person is found are suspicious, is one of fact and if a Magistrate is satisfied that the circumstances in which a person is brought before him, was found, are not suspicious, it is not the part of the High Court to reverse his order. S. 109 is one of the preventive sections and it must be rarely, if ever, that a High Court will feel called upon to reverse an order refusing to demand security. If however, the Magistrate demands security when he is not entitled to do so by law, the High Court will doubtless interfere. **A. I. R. 1934 A. 24 = 1933 A. L. J. 1201 = 1934 A. L. R. 233 = L. R. 14 A. (Cr.) 458 = 1934 Cr. C. 128 = 147 I. C. 433 = 35 Cr. L. J. 446 = 20 A. I. Cr. R. 428.**

XX.—NATURE OF PROCEEDINGS UNDER THIS CHAPTER—WHETHER PERSONS PROCEEDED AGAINST ARE “ACCUSED” PERSONS.

23. Is a proceeding under this chapter “criminal,” a “trial” or an “inquiry” and the person proceeded against, an “accused”? [*P. 204, n. 144*].—A proceeding under this chapter is an inquiry, which under the definition of the term excludes a trial. The person in respect of whom the inquiry is held is not an accused but a quasi-accused and he is not “deemed” to be an accused. A person bound down under this chapter is not a convicted person. **9 Pat. 131.**

24. Whether person proceeded against is a convicted person within the meaning of s. 426 (1).—Under s. 426 (1) the existence of an appeal by a convicted person is a condition precedent to jurisdiction to grant bail. But in the case of a person against whom an order is made under s. 118, there is no offence and no trial, he is not “a person convicted on a trial” nor is he a convicted person. s. 426 (1) has therefore no application to such a case. **9 Pat. 131.** But *see* **54 A. 861** where it was *held* that as s. 406 gives a right of appeal in such cases, the words “convicted person” in s. 426 should be held to include persons against whom an order has been passed by a Criminal Court and from which there is an appeal allowed.

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

SECTION 127.

Notes.—1. Assembly likely to cause a disturbance of the public peace [*P. 210, n. 4*].—Whether an assembly is likely to cause a disturbance of the public peace, has to be judged from its own acts and behaviour. When it appears that its behaviour is such as to indicate that it would be an active party to the disturb-

ance of public peace, or that it is reasonably calculated to provoke others to a breach of the peace, such an assembly may be ordered to disperse under this section. The section speaks of an actual unlawful assembly and a potential unlawful assembly. In the case of the latter, there must be evidence to establish that in the immediate future it would develop into an unlawful assembly animated by the common object of disturbance of the peace or that the natural consequence of the assembly itself is to provoke a disturbance. In every case it is a question of fact to be determined on the evidence relating to the conduct of the assembly. **A. I. R. 1933 Nag. 277 = 34 Cr. L. J. 705 = 144 I. C. 332 = 1933 Cr. C. 1068.**

2. When lawful assembly can be commanded to disperse [See *P. 210, n. 6*].—The mere refusal to desist from the lawful exercise of a right cannot be regarded as a cause of the disturbance of the peace. The prosecution must prove that the conduct of the assembly justified the command and it is for the Court to determine the legality of the command. The inability of the police to protect lawful rights cannot render the exercise of the lawful rights illegal or otherwise objectionable. **A. I. R. 1933 Nag. 277 = 34 Cr. L. J. 705 = 144 I. C. 332 = 1933 Cr. C. 1068.**

SECTION 128.

Amendment.—For the words “or soldier in Her Majesty’s Army” the words “soldier, sailor or airman in His Majesty’s Army, Navy or Air Force” shall be substituted.—**Act XXXV of 1934.**

SECTION 132.

Note.—Scope and object of the section.—The terms of s. 132 are as wide as, if not wider than those of s. 197. The object of the section is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they were acting or purporting to act as public servants. To claim the protection afforded by this section it is not necessary for the accused to prove the existence of an unlawful assembly or his *bonafide* belief in the existence of an unlawful assembly. The protection afforded by this section is different from that afforded by s. 79, I. P. C. S. 79, I. P. C. can only be applied when all the facts are known, *i.e.*, when the trial is over. S. 132, Cr. P. C. can only operate before the trial begins. The protection given by s. 79, I. P. C. is a protection against conviction while the protection given by s. 132, Cr. P. C. is a protection against trial. The two provisions are not identical. (1932) **M. W. N. 1225 = A. I. R. 1933 M. 263 = 5 M. Cr. C. 397 = 1933 Cr. C. 371 = 143 I. C. 115 = 34 Cr. L. J. 528.**

CHAPTER X.

PUBLIC NUISANCES.

SECTION 133.

APPLICATION OF CHAPTER.

Notes. 1.—Object and scope of the section.—There is no statutory provision in India justifying a private person or a member of the public in demolishing a building, etc., by way of abating a nuisance. The scheme of ss. 133 to 140 indicates that in the case of such a public nuisance, anybody aggrieved by it should not take the law into his own hands but must resort to the particular procedure laid down therein. **57 M. 351.** This section was not intended for the removal of long-standing obstructions, but for unlawful obstructions lately built on public places. Where a tannery had been in existence for over twenty years and other persons deliberately built a Mandi near by, it was held that an order should not be made for the removal of the tannery. **A. I. R. 1935 Lah. 28 = 1935 Cr. C. 19 ; A. I. R. 1930 Lah. 381 (1) = 31 Cr. L. J. 187 = 120 I. C. 796 = 1930 Cr. C. 965 = 13 A. I. Cr. R. 249.** Where the site occupied by the obstruction is found to be a public way which may be lawfully used by the public, the fact that in the particular case the public may have lot of room to go along the road without needing to walk upon that particular site has nothing to do with the case. They are entitled to walk along that site if they wish. **A. I. R. 1930 A. 751 = 32 Cr. L. J. 160 = 123 I. C. 604 = 1930 Cr. C. 1007.**

2. Whether *bonafide* claim will oust Magistrate's jurisdiction [See P. 217, n. 20]—The question whether the claim of the second party is *bonafide* or not, or in other words is a mere pretence or not, a question which under the case law prior to the amendment of 1923 was of vital importance is no longer so after the introduction of s. 139-A. What has now to be considered is very different from what was necessary to be determined then; what has now to be seen is whether the denial of the public right is supported by reliable evidence. If it is, the Magistrate has to stay his hands. 81 C. 390.

WHAT WOULD AMOUNT TO PUBLIC NUISANCE.

3. Occupation injurious to the health or physical comfort of the community [P. 219, n. 32 and p. 220 n. 40]—The word "community" cannot be distinguished either from the public or the "neighbours." There is no reason for making a definite distinction and for holding that a man may carry on a trade or occupation or keep goods or merchandise injurious to the health or physical comfort of his neighbours or of the public without becoming liable under s. 133 merely on the ground that there may be some part of the community which is not affected. 53 A. 706. Discomfort to the residents of the locality caused by the noise emanating from a mill amounts to a nuisance under this section. A. I. R. 1934 Nag. 193 (1) = 17 N. L. J. 54 = 1934 Cr. C. 892.

4. If encroachment is found to exist, no length of user will justify it [P. 219, n. 34]—Where the Lower Court has found it established that there is an encroachment, having heard the evidence in accordance with this section, it is justified in making an order under this section. There is no authority for importing into the section conditional clauses as regards length of user, etc. A. I. R. 1931 Lah. 159 (1) = 1931 Cr. C. 271 = 32 Cr. L. J. 1234 = 134 I. C. 783.

NUISANCES WHICH DO NOT JUSTIFY INTERFERENCE UNDER THIS SECTION.

5. Action under this section not expedient when trade or occupation is regulated by Municipal Acts.—It is generally inexpedient that a Magistrate should take action in respect of a trade or calling licensed by the Municipality. The regulation of such trades so as not to be injurious to the health or physical comfort of the community, is left by the Legislature to the control of the Municipal Boards who have a Health Officer to instruct them on matters of hygiene. Magistrates should not interfere in matters which have been made over by the Legislature to the Municipal Boards and the Committees of public health appointed under them. 54 A. 359.

6. Section not to be used as remedy for tortuous acts.—Where proceedings were started under this section against a person who raised the level of his low-lying land with the result that it prevented the flow of surplus water from the adjoining lands causing an overflow into other lands, it was held that this section will not be applicable. The proper remedy for the persons damaged is to proceed by a civil suit. A. I. R. 1933 C. 150 = 1933 Cr. C. 227 = 144 I. C. 75 = 34 Cr. L. J. 679.

7. Future obstructions or nuisance cannot be dealt with [P. 219, n. 36]—Preventive action in respect of an anticipated but non-existent nuisance is limited to the construction of any building or the disposal of any substance which is likely to occasion conflagration or explosion. Except for this, before any unlawful obstruction or nuisance can be removed, it is necessary that such unlawful obstruction or nuisance should be in existence. It cannot be postulated that a covered cess-pool in process of construction is going to be a public nuisance to justify an order prohibiting its construction. A. I. R. 1934 Nag. 230 = 17 N. L. J. 158 = 35 Cr. L. J. 1414 = 151 I. C. 754 = 1934 Cr. C. 1088.

8. Trades or occupations must in themselves be injurious [P. 220, n. 41]—This section deals only with occupations or trades which are in themselves injurious to health and has nothing whatever to do with trades which in themselves are harmless, but in the course of which a public nuisance might be committed. 58 C. 854.

PROCEDURE TO BE ADOPTED BY MAGISTRATE.

9. Magistrate need not take evidence in the first instance.—On receiving information the Magistrate need not take evidence and come to a finding on the question of whether the encroachment was made on the public road or not. The words "such evidence, if any, as he thinks fit" does not make it incumbent on him to hold such inquiry. It is after the parties have appeared before him that he makes an inquiry and comes to a finding on the point. A. I. R. 1931 A. 257 = 1930 A. L. J. 1335 = L. R. 12 A (Cr.) 13 = 15 A. I. Cr. R. 101 = 130 I. C. 627 = 1931 Cr. C. 417 = 32 Cr. L. J. 565.

10. Procedure under this Chapter [*P. 221, n. 44*].—When a notice has issued under s. 133 and been duly served under s. 134, the person to whom the notice issues must either perform that which he is called upon to do or appear to show cause why he should not. If he decides to show cause he will have also to decide whether he wants the matter to be tried by a jury, and if so, he must make the claim. At this stage s. 139-A must have been introduced, for it is provided that upon the party's appearance the Magistrate should forthwith ask him as to whether he denies the existence of any public right in respect of the way, etc. It is only after the question contained in s. 139-A is decided, that the Magistrate will, if he decides to go on with the case at all, proceed under s. 137 to take evidence either himself or if a jury is claimed, proceed to the appointment of a jury under s. 138. *A. I. R. 1932 A. 366 = 1932 A. L. J. 339 = L. R. 13 A. (Cr.) 130 = 1932 Cr. C. 441 = 138 I. C. 556 = 18 A. I. Cr. R. 213 = 33 Cr. L. J. 618; 55 A. 866; A. I. R. 1933 C. 790 = 37 C. W. N. 823 = 1933 Cr. C. 1357 = 35 Cr. L. J. 89 = 146 I. C. 538; A. I. R. 1933 Pat. 676 = 1933 Cr. C. 1439 = 146 I. C. 406 = 35 Cr. L. J. 54; A. I. R. 1933 Pat. 133 = 16 P. L. T. 218 = 154 I. C. 871; A. I. R. 1933 Nag. 267 = 29 N. L. R. 361 = 35 Cr. L. J. 145 = 146 I. C. 601 = 1933 Cr. C. 1001. When the Magistrate finds that there is no reliable evidence under s. 139-A he should proceed under s. 137 or s. 138 and not make the rule under s. 133 absolute immediately. *A. I. R. 1934 Pat. 145 (1) = 14 P. L. T. 778 = 35 Cr. L. J. 438 = 147 I. C. 804 = 1934 Cr. C. 338.**

FURTHER INQUIRY.

11. Revival of proceedings [*P. 223, n. 59*].—There is nothing in the law to prevent the Magistrate drawing up fresh proceedings under this section, on proper materials. *34 C. W. N. 957 = 1931 Cr. C. 34 = 128 I. C. 810 = 32 Cr. L. J. 139 = A. I. R. 1931 C. 2.*

REVISION.

12. Powers of High Court in revision [*P. 224, notes 62—67*].—The High Court has power not only to confirm the order of the Magistrate but also to modify that order to such extent as may seem fit. *1929 A. L. J. 385 = A. I. R. 1929 A. 220 = L. R. 10 A. (Cr.) 49 = 30 Cr. L. J. 670 = 116 I. C. 786 = 11 A. I. Cr. R. 350.*

ORDERS UNDER THIS CHAPTER AND CIVIL PROCEEDINGS.

13. Institution of civil suit not a bar to proceedings under this Chapter.—The fact that a civil suit has been instituted is no bar to the proceedings. The civil suit may take a long time and in the meantime it is quite competent to the Magistrate to decide the matter summarily under this Chapter. *A. I. R. 1933 C. 318 = 56 C. L. J. 249 = 1933 Cr. C. 401 = 143 I. C. 178 = 34 Cr. L. J. 532.* S. 139-A. (2) provides for the stay of proceedings under Chapter X if the Magistrate finds that there is reliable evidence in support of the denial of the existence of a public right. If the Magistrate finds that there is no such reliable evidence, the mere fact that the party denying the right has filed a civil suit for a declaration of his right, is no ground for stay of further proceedings under this Chapter. *A. I. R. 1934 A. 131 = 4 A. W. R. 561 = 1934 A. L. J. 342 = 1934 Cr. C. 189 = 151 I. C. 897 = 35 Cr. L. J. 1445; A. I. R. 1934 Pat. 145 (1) = 14 P. L. T. 778 = 35 Cr. L. J. 438 = 147 I. C. 804 = 1934 Cr. C. 338.*

SECTION 134.

Note.—Proclamation to be resorted to only when service cannot be effected in the manner provided for service of summons.—It is only if the order cannot be served in the manner provided for service of summons that the publication of a proclamation under sub-sec. (2) may be resorted to. Where the constable, on not finding the person, forthwith caused the order to be proclaimed by beat of drum and by attaching a copy thereof to a tree, *held*, there was no proper service. The constable should have made an attempt before resorting to proclamation to serve the order through any relative of the person as laid down in s. 70 or by affixing a copy to his house as laid down in s. 71. *A. I. R. 1935 C. 251 = 60 C. L. J. 474 = 39 C. W. N. 141.*

SECTION 135.

Note.—Application for jury may operate as waiver of plea of *bonafide* claim [*P. 226, n. 3*].—When a person applies to have the case decided under s. 135 (b) he has waived the claim of its being of a civil nature and he cannot re-assert them at the stage of proceedings in revision. *A. I. R. 1931 A. 287 = 1930 A. L. J. 1335 = L. R. 12 A. (Cr.) 13 = 15 A. I. Cr. R. 101 = 130 I. C. 627 = 1931 Cr. C. 417 = 32 Cr. L. J. 585.*

SECTION 137.

Notes.—1. Magistrate bound to take evidence (*P. 228, n. 1*)—When the applicant appeared and contended that there was no obstruction to the public traffic and that he had put up the stall which was objected to, with the permission of the authorities, but the Magistrate did not take evidence nor did he record even the statement of the person showing cause or question him as required by s. 139-A, the Magistrate's order was wholly unjustified. *A. I. R. 1931 Oudh 397 = 8 O. W. N. 651 = 132 I. C. 810 = 1931 Cr. C. 829 = 32 Cr. L. J. 1165; 11 Lah. 247.*

2. Magistrate cannot act on personal local investigation without taking evidence [*P. 228, n. 2*]—Where the Magistrate has taken the trouble to inspect the locality for himself, the necessity of examining witnesses is greatly obviated. But the inspection by the Magistrate must be conducted and used in accordance with s. 539-B. He must record a memorandum of the relevant facts observed. Such memorandum is to be used for "properly appreciating the evidence given at the inquiry or trial." The Court cannot base its judgment on its own inspection note. There must be substantive evidence besides the inspection note which must also be placed on the record. *A. I. R. 1934 A. 325 = 1934 A. L. J. 1179 = 4 A. W. R. 1608 = 1934 A. L. R. 429 = 35 Cr. L. J. 703 = 143 I. C. 615 = 1934 Cr. C. 409; A. I. R. 1934 Pat. 316 (1) = 15 P. L. T. 288 = 35 Cr. L. J. 1020 = 149 I. C. 839 = 1934 Cr. C. 737; A. I. R. 1935 Lah. 28 = 1935 Cr. C. 19.*

3. Magistrate should drop proceedings if applicant is unable to prove existence of public right.—If the person who alleges that a public pathway has been obstructed, is unable to show that a public pathway exists, the Magistrate is certainly neither required nor entitled to act as if it had been found that a public pathway did exist; and in the absence of evidence of actual dedication the person defending the case has merely to adduce reliable evidence to show that the use of the path by the public has not been sufficiently long to establish a prescriptive right. *A. I. R. 1934 Pat. 433 = 15 P. L. T. 386 = 153 I. C. 471 = 1934 Cr. C. 943.*

SECTION 138.

APPOINTMENT OF JURY.

Notes.—1. Jury when to be appointed.—It is open to the party to elect to have the matter tried by a jury after it has been decided by the Magistrate under s. 139-A that there is no reliable evidence in support of the denial of the existence of the public way. *A. I. R. 1933 C. 318 = 56 C. L. J. 249 = 1933 Cr. C. 401 = 143 I. C. 178 = 34 Cr. L. J. 532.*

2. Magistrate should exercise own discretion [*See p. 230, n. 4*]—In nominating jurors a Magistrate should exercise his own discretion and not merely accept the names suggested by the party. *A. I. R. 1929 B. 79 = 31 Bom. L. R. 79 = 30 Cr. L. J. 785 = 117 I. C. 333.* A member of a District Board is not an unsuitable person to be nominated by the District Board to serve on a jury for purposes of seeing whether there has been an encroachment on public property under the control of the District Board. *1930 A. L. J. 1335 = A. I. R. 1931 A. 257 = L. R. 12 A. (Cr.) 13 = 32 Cr. L. J. 563 = 130 I. C. 627 = 1931 Cr. C. 417 = 15 A. I. Cr. R. 101.*

3. Irregularity in appointment of Jury, vitiates proceedings.—The nomination of the jury is a nomination of the Court and irregularity with regard to that matter is an irregularity which goes to the root of the proceedings. Where the Magistrate nominated the foreman and asked the parties to nominate the others, the proceedings were irregular. *A. I. R. 1930 Pat. 199 = 31 Cr. L. J. 53 = 120 I. C. 289 = 13 A. I. Cr. R. 165.*

SECTION 139-A.

Notes.—1. Sub-sec. (1). If the person against whom the order was made denies the existence of the public right, the Magistrate shall inquire into the matter. See note 10 to s. 133 as to procedure under this Chapter. If the existence of the public right is not denied, this section does not apply. *33 C. W. N. 743 = A. I. R. 1929 C. 507.* Under this section, the party against whom the provisional order is made is to appear and state his case. If he is inclined to deny the existence of the public right, he must say so. If he has denied it, he is to be required to produce reliable legal evidence in support of his denial. Obviously the Magistrate, in order to satisfy himself whether the evidence is reliable, may allow cross-examination of the witnesses adduced in support of such denial. The inquiry being of a summary character the opposite party should not be required to adduce rebutting evidence. But it must be understood that there is nothing in s. 139-A which

can exclude the exercise of the Court's powers under s. 540 of the Code. 58 C. 461. Under this section the Magistrate is left an absolute discretion as to how far he will go or upon what materials he will act in considering whether the defendant seems likely to have such a case in support of his denial as may make it unfitting for the Criminal Court to proceed. 1929 A. L. J. 385 = A. I. R. 1929 A. 220 = L. R. 10 A. (Cr.) 49 = 30 Cr. L. J. 670 = 116 I. C. 786 = 11 A. I. Cr. R. 350. If the Magistrate was betrayed by an error of procedure into coming to a decision which could only be pronounced properly by a Civil Court, the result undoubtedly did prejudice the person proceeded against, for the result is an order compelling him to remove the obstruction set up on his own land without any authoritative decision that he has been obstructing a public way. 55 A. 866.

2. Magistrate need not examine every witness produced.—Under this section, there is no obligation on the Magistrate to examine every witness produced. He is to inquire into the existence of the public right and if it appears that there is reliable evidence in support of the denial, he has to stay proceedings. The words used are "reliable evidence" and not "proved." The object of s. 139-A is to prevent the Magistrate in inquiring into matters under Ch. X, arrogating to himself the functions of a Civil Court and instituting an elaborate inquiry with regard to the rights of the parties. 34 C. W. N. 957 = A. I. R. 1931 C. 2 = 1931 Cr. C. 34 = 128 I. C. 810 = 32 Cr. L. J. 189; 7 Luck. 533; A. I. R. 1932 Oudh 120 = 9 O. W. N. 115 = 1932 Cr. C. 193 = 33 Cr. L. J. 384 = 136 I. C. 839 = 18 A. I. Cr. R. 150.

3. Sub-sec. (2).—Party asserting the right should establish the same in Civil Court if there is reliable evidence in support of the denial of such right.—The question whether the claim of the second party is *bonafide* or not, or, in other words, is a mere pretence or not, a question which under the case-law prior to the amendment of 1923 was of vital importance, is no longer so after the introduction of s. 139-A. What has now to be considered is very different from what was necessary to be determined then. What has now to be seen is whether the denial of the public right by the second party is supported by any reliable evidence. If it is, the Magistrate has to stay his hands and it is the party moving for proceedings under s. 133 or somebody interested in asserting such right, who has got to go to the Civil Court to establish its existence. 61 C. 390. The question is not whether the denial is *bonafide* or not, but whether there is reliable evidence in support of it—two matters which are very different. 1929 A. L. J. 385 = A. I. R. 1929 A. 220 = L. R. 10 A. (Cr.) 49 = 30 Cr. L. J. 670 = 116 I. C. 786 = 11 A. I. Cr. R. 350. The Magistrate should not direct any particular party to obtain a declaration from the Civil Court. A. I. R. 1935 A. 79 = 1935 A. L. J. 18 = 36 Cr. L. J. 144 = 152 I. C. 737 = 1935 Cr. C. 107; 52 A. 592; A. I. R. 1929 A. 220.

4. What is "reliable evidence."—The record of rights is a very valuable piece of evidence which raises the presumption of the correctness of the entries therein, and if it happens to be in favour of the party denying the public right, the Magistrate is justified in considering it as reliable evidence. A. I. R. 1931 C. 2 = 34 C. W. N. 957 = 1931 Cr. C. 34 = 128 I. C. 810 = 32 Cr. L. J. 189; A. I. R. 1935 Pat. 218 (2) = 16 P. L. T. 179. The fact of ownership is a very solid fact and in the majority of cases will undoubtedly provide "reliable evidence" within the meaning of sub-section (2) in the absence of very cogent evidence on the other side. 55 A. 866. Where under the Municipal Act all public streets vest in the Municipal Committee, the absence of the inclusion of the disputed road in the Municipal Jamabandi is *prima facie* good evidence which tends to negative the plea that the road is a public road. A. I. R. 1933 Nag. 267 = 29 N. L. R. 361 = 35 Cr. L. J. 145 = 146 I. C. 601 = 1933 Cr. C. 1001.

5. Non-observance of the provisions of this section will render proceedings invalid.—It is only in cases where the Magistrate finds that there is no reliable evidence in support of the denial of the public right that he is empowered by sub-sec. (2) to proceed further in the matter. Without finding either that a public right existed or that there was no evidence in support of the denial of such right, a Magistrate has no jurisdiction to make the order absolute. A. I. R. 1935 Pat. 138 = 16 P. L. T. 218 = 154 I. C. 871; A. I. R. 1930 C. 144 = 31 Cr. L. J. 767 = 124 I. C. 832 = 1930 Cr. C. 144; 57 C. 368; A. I. R. 1930 Lah. 1046 = 32 Cr. L. J. 250 = 129 I. C. 222 = 1930 Cr. C. 1222. Where the Magistrate did not put to the person appearing to show cause, the relevant questions under this section and overlooked its provisions in spite of the fact that he had distinctly denied the existence of the alleged public right, in his written statement and had further asserted that the land was his property and that he had constructed the superstructure some six or seven years back with the permission of the Municipal Committee, and the Magistrate did not call upon him to produce evidence in support of his denial and passed an order for the production of prosecution evidence under s. 137, it was *held* that the proceedings were entirely without jurisdiction. A. I. R. 1931 Lah. 62 = 32 P. L. R. 11 = 130 I. C. 834 = 1931 Cr. C. 142 = 32 Cr. L. J. 621. It is doubtful whether waiver on the part of the person appearing to

show cause, will justify non-compliance with this section. **A. I. R. 1930 Pat. 199 = 31 Cr. L. J. 53 = 120 I. C. 289 = 13 A. I. Cr. R. 165.** Where the procedure followed was as indicated in clause (2), the mere omission to put the formal question whether the person denied the existence of the public right was at the best an irregularity covered by s. 537. **57 C. 252.**

6. Revision.—A District Magistrate has no jurisdiction to revise or set aside the order of the Taluk Magistrate passed under this section. He could only submit the records to the High Court under s. 438. **(1933) M. W. N. 735.**

SECTION 140.

Notes.—1. Magistrate bound to pass order under s. 140 (1) if the order has been made absolute under s. 139 (1).—After making a conditional order absolute under s. 139 (1) the Magistrate must under sub-section (1) of s. 140 which is mandatory, give notice thereunder as required, even though the opposite party might have filed a civil suit to declare his rights. But it is within the discretion of the Magistrate whether or not to take further proceedings under sub-section (2) pending disposal of the civil suit. **58 C. 1088.**

2. Accused cannot go behind the order [P. 234, n. 6].—The validity of the final order in the proceedings under s. 123 could not be raised at the trial of the accused for an offence under s. 188, I. P. C. for disobedience to that order. **60 C. 1336.**

SECTION 143.

Notes.—1. Object of the section.—The object of this section is to give the Magistrate summary powers to issue an order against a person who is repeating or continuing a public nuisance, that is to say, who has repeated an act already forbidden by a competent tribunal. It is not for original use. **A. I. R. 1934 Pat. 305 = 15 P. L. T. 253 = 36 Cr. L. J. 187 = 152 I. C. 708 = 1934 Cr. C. 728.** It contemplates the prevention of a repetition or the continuance of a public nuisance by the party against whom an order under s. 133 has already been passed, and it binds only the party against whom the order is passed. Hence an order cannot be made under s. 143 against a person who was not a party to the proceedings under s. 133. **A. I. R. 1935 A. 79 = 1935 A. L. J. 18 = 36 Cr. L. J. 144 = 152 I. C. 737 = 1935 Cr. C. 107.**

2. Procedure.—An order passed under this section without drawing up a proceeding, without taking evidence and without giving an opportunity to the persons affected to substantiate their case, is wholly without jurisdiction and illegal. An order without an adjudication about the existence of the public nuisance as contemplated in the section by a competent Court is bad in law and illegal. **A. I. R. 1935 C. 108 (2) = 38 C. W. N. 1070 = 154 I. C. 663 = 1935 Cr. C. 102.**

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

SECTION 144.

II.—ACTION UNDER s. 144 or s. 145.

Notes.—1. Magistrate has discretion to proceed under s. 144 or s. 145 [P. 238, n. 7].—The Magistrate can act either under s. 144 or s. 145 to meet the emergency. His choice is not to be considered in the light of the fact that at a later stage when the emergency can be viewed on a different basis, another method may be adjudged to have been a more proper or satisfactory method in the circumstances. **13 Pat. 76.**

III.—CIRCUMSTANCES WHICH JUSTIFY PROCEEDINGS.

2. Existence of emergency [P. 239, n. 10].—It is for the Magistrate, who knows the local conditions to say whether an emergency exists or not. If there was clear evidence that no reasonable man could hold that there was an emergency and that the Magistrate was not acting *bonafide*, the High Court could interfere by way of revision. **58 B. 322; A. I. R. 1934 Oudh 87 (1) = 11 O. W. N. 74 = 1934 O. L. R. 54 = 35 Cr. L. J. 472 = 147 I. C. 672 = 1934 Cr. C. 257.** It is only in exceptional circumstances where emergency of the gravest character is made out, that a Court would be justified to make an order interfering with the exercise of the private rights of individuals. **A. I. R. 1934 C. 513 = 38 C. W. N. 388 = 35 Cr. L. J. 1252 = 151 I. C. 183 = 1934 Cr. C. 754.** If there is such an emergency, private rights must give way, whatever be the subject-matter of the dispute. **A. I. R. 1929 Pat. 714 = 1929 Cr. C. 586.**

3. Order is justifiable if the direction is likely to prevent obstruction, annoyance, etc. [*P.* 239, n. 11]—Where a person simply wants to enforce his rights, the Criminal Courts ought not to lend him their aid under s. 144. *A. I. R.* 1929 *M.* 845 = 2 *M. Cr. C.* 302 = 30 *Cr. L. J.* 1010 = 119 *I. C.* 166 = 1929 *Cr. C.* 613.

Annoyance.—Annoyance may be either physical or mental. In the case of physical annoyance a certain degree of proximity between the object annoyed and the annoyance is necessary, but in the case of mental annoyance no question of proximity arises. This section covers both kinds of annoyance. *55 B. 322. Injury to human life or safety.*—The Magistrate has got to be satisfied that the direction was likely to prevent injury or risk of injury to human life or safety. The question of injury to property as distinguished from danger to or safety of human life occupying the property has got very little relevancy. Where therefore an order was made directing a person to abstain from driving piles on his property to strengthen the foundation of his proposed construction, on the ground that it resulted in cracks in the walls of the neighbour's house, *held* that the order could not be upheld. *A. I. R.* 1934 *C.* 513 = 38 *C. W. N.* 338 = 35 *Cr. L. J.* 1252 = 151 *I. C.* 183 = 1934 *Cr. C.* 754. *Disturbance of public tranquility*—The act prohibited under this section must be so prohibited if it is likely to prevent obstruction, etc., or disturbance of the public tranquility, etc. It is not enough to say that by stretching several possibilities one after the other, it is possible to establish a connection of cause and effect between the act prohibited and disturbance of public tranquility. The connection must be reasonable or proximate and not merely speculative or distant. Where there are no circumstances peculiar to the locality and the matter is one of general impression the absence of any near or reasonable connection between the prohibited act and the supposed danger to public tranquility will be a ground upon which the High Court is bound to act. Where a Magistrate prohibited the wearing of Gandhi caps and it was shown that the connection between Gandhi caps and the civil disobedience movement which disturbed public tranquility, was only a distant and possible one and not a near and probable one, the order was set aside. The mere apprehension that unknown dangers were looming ahead, leaves the matter so uncertain that it can hardly be made the occasion for a general order preventing people from wearing caps of a particular kind. It is legal to prohibit the wearing of caps, etc., if it amounts to participation in or encouragement of revolutionary propaganda, or any movement calculated to paralyze the administration. But there should be satisfactory evidence to show that it was necessary to pass such an order. Otherwise, such an order is more likely by its irritating effect to adversely affect the public peace. In such circumstances it is the duty of the High Court in the interests of public peace to set matters right. (1610) *M. W. N.* 841 = 60 *M. L. J.* 378 = 33 *M. L. W.* 632 = *A. I. R.* (1931) *M.* 236 = 3 *M. Cr. C.* 395 = 32 *Cr. L. J.* 744 = 131 *I. C.* 449 = 1931 *Cr. C.* 332 = 16 *A. I. Cr. R.* 361.

IV.—ORDER.

4. Contents [*P.* 239, n. 13]—The order must show the necessity for speedy remedy by stating material facts. *A. I. R.* 1931 *B.* 513 = 33 *Bom. L. R.* 1178 = 1931 *Cr. C.* 945 = 134 *I. C.* 1237 = 33 *Cr. L. J.* 75.

5. Order must be specific and definite in its terms [*P.* 240, n. 16]—This section empowers a Magistrate to interfere materially with the liberty of the subject and it is therefore necessary that he should promulgate his order in terms sufficiently clear to enable the public or persons affected by it to know exactly what it is which they are prohibited from doing. *A. I. R.* 1935 *B.* 33 = 36 *Bom. L. R.* 1129 = 154 *I. C.* 637 = 1935 *Cr. C.* 63. An order under this section must show two things plainly, (1) the thing which is prohibited and (2) the persons who are prohibited. To include in the order "any other persons who are or may be concerned in this project" is too vague. *55 B. 322.* But the order will be valid so far as it refers to certain specific persons. *A. I. R.* 1931 *B.* 513 = 33 *Bom. L. R.* 1178 = 1931 *Cr. C.* 945 = 134 *I. C.* 1237 = 33 *Cr. L. J.* 75. All injunctions should be clear and definite. They should be free from any kind of ambiguity. If the order is indefinite it would not be right to prosecute anybody for disobeying it even if the party knew well what the Magistrate intended. *A. I. R.* 1932 *C.* 288 = 36 *C. W. N.* 243 = 1932 *Cr. C.* 214 = 137 *I. C.* 816 = 33 *Cr. L. J.* 518.

V.—PROCEDURE AND EVIDENCE.

6. Magistrate can depute another Magistrate to inquire and report.—It is competent for a Magistrate who has to make an order under this section to depute another Magistrate to make an inquiry and submit a report and then to act on the report so submitted. The Magistrate is of course not competent to delegate his functions to some other Magistrate, but so long as the inquiry is limited to the purpose of collection of materials to enable him to form his own conclusions, it cannot be said that there is any delegation in the real sense of the word. *A. I. R.* 1933 *C.* 343 = 142 *I. C.* 319 = 34 *Cr. L. J.* 334 = 1933 *Cr. C.* 420.

7. Opportunity to show cause must be given [*P. 240, n. 17*].—Under the law an *ex parte* order may be made in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed. But when such an order is made, the party aggrieved has the right to have an opportunity of appearing before the Magistrate and showing cause against the order, with a view to getting it rescinded or altered. 33 C. W. N. 556 = A. I. R. 1934 C. 393 = 35 Cr. L. J. 831 = 143 I. C. 773 = 1934 Cr. C. 534 = 21 A. I. Cr. R. 203. For such purpose the Magistrate has to consider whether the claims advanced by one or other of the parties are within or in excess of their legal and natural rights and to alter or rescind the order if necessary to see that protection is given to the persons who act within the bounds of their legal and natural rights without being molested by the breaker's of the law having at the same time due regard to the preservation of public tranquility. A. I. R. 1932 M. 294 = (1932) M. W. N. 144 = 35 M. L. W. 366 = 62 M. L. J. 392 = 1932 Cr. C. 230 = 5 M. Cr. C. 102 = 138 I. C. 354 = 33 Cr. L. J. 605.

8. Service of notice—burden of proof.—A person who takes the trouble of getting an order under this section against another person is very unlikely not to take steps so that the other person may know of the order and it is for the accused to show, if he could, that it was not served on him and that he had no reason to come to hear of the proceedings. 53 C. L. J. 64 = 1931 Cr. C. 294 = 131 I. C. 271 = 32 Cr. L. J. 630 = A. I. R. 1931 C. 262.

9. Proceedings under this section are judicial [*P. 240, n. 20*].—Orders under this section are judicial and not administrative. A. I. R. 1931 M. 242 = (1930) M. W. N. 849 = 3 M. Cr. C. 331 = 60 M. L. J. 370 = 1931 Cr. C. 362 = 131 I. C. 649 = 33 M. L. W. 640 = 32 Cr. L. J. 763. If the order is judicial, the Magistrate must keep an open mind and record not necessarily the whole but at least a reasonable portion of the evidence essential for the judicial determination of the objection. A. I. R. 1931 B. 325 = 33 Bom. L. R. 673 = 1931 Cr. C. 581 = 32 Cr. L. J. 1144 = 134 I. C. 344. When an *ex parte* order is called in question, evidence should be recorded in the usual way by examination and cross-examination of witnesses in open Court. A. I. R. 1931 M. 236 = (1930) M. W. N. 841 = 3 M. Cr. C. 395 = 60 M. L. J. 378 = 1931 Cr. C. 332 = 131 I. C. 449 = 33 M. L. W. 632 = 32 Cr. L. J. 744 = 16 A. I. Cr. R. 361. An order based on evidence taken in the absence of the parties is bad. 7 Pat. 269.

10. Person against whom order is made is entitled to a copy of information.—Proceedings under this section are judicial and the person against whom an order is made under this section is entitled to a copy of the information given to the Magistrate and on which his order is based in order to enable him to show that it was unfounded or insufficient. A. I. R. 1931 M. 242 = (1930) M. W. N. 849 = 3 M. Cr. C. 331 = 60 M. L. J. 370 = 1931 Cr. C. 362 = 131 I. C. 649 = 33 M. L. W. 640 = 32 Cr. L. J. 763.

VI.—POINTS TO BE NOTED IN PASSING ORDERS.

11. Magistrate not to make positive orders requiring people to do particular things.—Where the Magistrate directed a person "to leave the district by the next available train" *held*, such an order could not be made. When a Magistrate is given power to direct any person to abstain from a certain act, he cannot make an order which is in effect not a direction to abstain from doing anything but a direction upon a person to remove himself from the district and to do so by the next available train. It was never intended by s. 144, that a man might be ordered to remove himself not only from his own house but also from his own district, and to do so by the next available train. Such an order is bad in its character. 58 C. 1037; 12 Rang. 283. The Magistrate is only entitled to make a restrictive order preventing the opposite party from doing an act, but it does not enable him to make a mandatory order directing the opposite party to do some act. A. I. R. 1933 C. 724 = 1933 Cr. C. 1274 = 146 I. C. 169 = 34 Cr. L. J. 1192 = 33 C. W. N. 115.

12. Suspension of private rights.—It is the duty of Magistrates to limit the interference as much as possible [*P. 240, n. 21*].—Courts, civil as well as criminal, exist for the protection of rights and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; when an order in suppression of lawful rights has to be made, it ought not to be made unless the Magistrate considers that other action that he is competent to take, is not likely to be effective; and the order, if made, should never be disproportionate to, but should always be, as far as possible, commensurate with the exigencies of any particular situation. A. I. R. 1933 C. 348 = 142 I. C. 319 = 34 Cr. L. J. 334 = 1933 Cr. C. 420.

13. Power to regulate the conduct of religious processions [*P.* 241, See *n.* 24]—No civil suit will lie in a Civil Court to question the propriety of an order made by a Magistrate even if it restricts the ordinary right of using a public thoroughfare when he apprehends danger, or in urgent cases of nuisance under s. 144 and other sections of the Code. The right of way over a public road must always be subject to such orders of the Magistrate. 53 A. 484. But an absolute prohibition of all processions in all streets, secular and religious, without fixing any time limit during day or night is *prima facie* unreasonable and if such orders are passed repeatedly without making any sort of inquiry as to the relative rights of the parties, it would be clutching at a more extensive jurisdiction by issuing a permanent injunction restraining the parties from taking processions for a pretty long time and such a course is an indirect evasion by the Magistracy of the law as laid down in s. 144. A. I. R. 1932 M. 294 = 62 M. L. J. 392 = (1932) M. W. N. 144 = 35 M. L. W. 366 = 1932 Cr. C. 280 = 5 M. Cr. C. 102 = 138 I. C. 354 = 33 Cr. L. J. 605. If a procession is in itself lawful it should not be prohibited merely because other communities object to it on the sole ground that it is an innovation. A. I. R. 1935 A. 575.

14. Holding of hats or markets—Jurisdiction of Magistrates to regulate [*P.* 242, *n.* 25]—The opening of a *hat* in close proximity of a rival *hat* is by itself not a ground for passing an order under this section, unless the newcomer is doing or is likely to do any wrongful act likely to lead to a breach of the peace. If one or both are committing wrongful acts, the best course will be to bind down the wrong doer under s. 107. A. I. R. 1934 Pat. 104 = 14 P. L. T. 740 = 35 Cr. L. J. 1057 = 1934 Cr. C. 198 = 150 I. C. 118.

IX.—SCOPE OF CL. (3) VALIDITY OF ORDERS ADDRESSED TO THE PUBLIC.

15. Order to be directed to public frequenting or visiting a particular place [*P.* 246, *n.* 44]—Sub-section (3) is an exception to the general rule that the order shall be directed to a particular person. But the order can be directed to the public generally only "when frequenting or visiting a particular place" such, for instance, as a market or a park or other place within a specified boundary. There is no power to direct the public simpliciter. A. I. R. 1931 B. 513 = 33 Bom. L. R. 1178 = 1931 Cr. C. 943 = 134 I. C. 1237 = 33 Cr. L. J. 78; A. I. R. 1931 B. 325 = 33 Bom. L. R. 673 = 1931 Cr. C. 581 = 32 Cr. L. J. 1144 = 134 I. C. 344; 38 C. W. N. 556 = A. I. R. 1934 C. 393 = 35 Cr. L. J. 881 = 148 I. C. 773 = 1934 Cr. C. 534 = 21 A. I. Cr. R. 203. In 59 B. 27 it was held that there is nothing in s. 144 (3) to show that the word "place" necessarily means a restricted locality like a market or a park. It could include a part of the town provided that part is sufficiently well defined so as to be easily distinguishable. Even a ward of a Municipality could be described as a place with a specified boundary, provided the boundaries on all sides are clearly given so that the public could be under no misapprehension or doubt as to what the prohibited area was. Mere mention of the wards without mentioning the boundaries and without naming the streets covered by them, is not sufficient. An order directed to the public when frequenting public or private streets in a particular city is sufficiently definite as to place, to comply with the requirements of this section. A. I. R. 1935 B. 33 = 36 Bom. L. R. 1129 = 154 I. C. 637 = 1935 Cr. C. 68. The place must be one whether publicly or privately owned, which at the time when the prohibition operates, the public frequent or visit. The place must be one which is open to the public as such. The public cannot be prohibited from putting up flags in private houses because the public as such never frequent or visit private houses. It is a mis-use of language to call house-owners who use their houses members of the public for the purpose of this section. (1930) M. W. N. 849 = A. I. R. 1931 M. 242 = 60 M. L. J. 370 = 33 M. L. W. 640 = 3 M. Cr. C. 381 = 32 Cr. L. J. 763 = 131 I. C. 649 = 1931 Cr. C. 362.

XI.—REVISION.

16. Under the amended Act, High Court has power to revise orders under this section [*P.* 247, *n.* 52]—The amendment introduced by the Act of 1923 by deleting sub-sec. (3) from s. 435 which till then existed, has made the order of the Magistrate open to revision. A. I. R. 1933 C. 348 = 142 I. C. 319 = 34 Cr. L. J. 334 = 1933 Cr. C. 420; 12 Rang. 283; 53 M. 320. The powers of the High Court in revision are general and their generality cannot be cut down by any decision. The High Court is to satisfy itself as to the correctness, legality or propriety of the order of the Lower Court. The propriety or otherwise of orders under s. 144 can be gone into by the High Court. Where the elements essential to action under s. 144 are shown to exist upon materials legally before the Court, the High Court will in exercising its powers, respect the opinion of the local authorities. But if those essential elements do not upon a fair view of the evidence, exist, the High Court will not blindly uphold the order of the Magistrate because he says they do exist. That would amount to the High Court relinquishing its function into the hands of the Lower Court. If the grounds for the action

are either unfounded in fact or insufficient in law, or if the order against the public violates the conditions laid down in s. 144, it is the duty of the High Court to interfere. *A. I. R. 1931 M. 242 = (1930) M. W. N. 849 = 3 M. Cr. C. 381 = 60 M. L. J. 370 = 1931 Cr. C. 362 = 131 I. C. 649 = 33 M. L. W. 640 = 32 Cr. L. J. 763.* The High Court will never reimpose an order under s. 144 which the District Magistrate who is responsible for the peace of the district does not wish and in his discretion has rescinded under sub-sec. (4). *A. I. R. 1934 Pat. 313 = 15 P. L. T. 216 = 151 I. C. 835 = 1934 Cr. C. 734.*

17. Power of Magistrate to rescind or alter order under sub-sec. (4) does not bar High Court's power to revise.—The jurisdiction conferred by sub-section (4) upon a Magistrate to rescind or alter an order under this section, made by himself or any Magistrate subordinate to him or by his predecessor in office, is neither appellate nor revisional jurisdiction. It is a special jurisdiction conferred by a special provision of the Statute. It cannot be argued therefore, that no appeal having been made to the Magistrate under sub-section (4) no revision petition to the High Court can be entertained. *A. I. R. 1932 M. 720 = (1932) M. W. N. 726 = 5 M. Cr. C. 269 = 36 M. L. W. 461 = 63 M. L. J. 594 = 139 I. C. 773 = 33 Cr. L. J. 826.* The proper procedure is no doubt to apply under sub-sec. (4) to the District Magistrate who has power to set aside the prohibitory order. But when it is necessary that the matter should be disposed of expeditiously, the party is justified in coming to the High Court direct. *A. I. R. 1934 C. 139 = 37 C. W. N. 962 = 35 Cr. L. J. 541 = 147 I. C. 1090 = 1934 Cr. C. 179.* Where the Sub-divisional Magistrate drew up proceedings under s. 144, the District Magistrate has no power to direct the Sub-divisional Magistrate to draw up proceedings under s. 145. The proper course is for him to refer the matter to the High Court, under s. 438. *33 C. W. N. 723 = A. I. R. 1929 C. 751 = 1929 Cr. C. 385; A. I. R. 1929 C. 805 = 50 C. L. J. 287 = 34 C. W. N. 82 = 1929 Cr. C. 574.*

18. Exercise of revisional powers when order has spent itself [*P. 247, n. 54*].—If the order under this section has ceased to be in force by efflux of time, the High Court should not interfere with it in revision. *A. I. R. 1934 Oudh 87 (1) = 11 O. W. N. 74 = 1934 O. L. R. 54 = 35 Cr. L. J. 472 = 147 I. C. 672 = 1934 Cr. C. 287.* But even though the order has spent itself, the High Court is entitled to interfere if the order purported to decide upon the rights of the parties. *A. I. R. 1933 Pat. 185 = 14 P. L. T. 379 = 34 Cr. L. J. 717 = 144 I. C. 228 = 1933 Cr. C. 516.*

19. High Court can suspend order under this section.—*See* note 12 to s. 439.

CHAPTER XII.

DISPUTES AS TO IMMOVABLE PROPERTY.

SECTION 145.

II.—COMPETENCY OF MAGISTRATES.

(B)—LOCAL.

Notes.—1. Property must be within the jurisdiction of the Magistrate [*P. 252, n. 13*].—A Magistrate of the First Class whose powers have been gazetted throughout the District does not lose jurisdiction by the mere fact that for the sake of convenience the District Magistrate has divided the District up into ilaqs and that the ilaqa in which the particular property is situate has not been allotted to that Magistrate. *A. I. R. 1933 Lah. 143 = 1933 Cr. C. 241 = 34 P. L. R. 365 = 142 I. C. 430.*

III.—OBJECT OF SECTION.

2. Object of Section is to deal with actual possession and not with right to possession [*P. 253, n. 17*].—An inquiry under this section, should as far as possible be confined to the question of possession only. *A. I. R. 1935 Pat. 83 = 16 P. L. T. 19 = 154 I. C. 426 = 1935 Cr. C. 143; 5 Lusk. 440.* When there are many separate items of property in dispute, all together claimed by one person on one side, and severally by many persons on the other side, the Magistrate *must* consider the claims of *each* of the counter-petitioners. (1933) *M. W. N. 1260.* No question of title can be taken into consideration in an inquiry under this section, nor can any order be passed as regards future possession without reference to actual possession on the date of the preliminary order. *A. I. R. 1929 Nag. 285 = 121 I. C. 47 = 1929 Cr. C. 459.*

IV.—WHEN TO ACT UNDER THIS SECTION AND WHEN UNDER S. 107 or S. 144.

3. **When title is in dispute, both parties should be bound down** [See *p.* 254, *n.* 21]—Where there is a dispute between two parties as to title, it is hardly fair to bind down one party only, thereby giving the other side an advantage. In such cases if s. 107 is utilized, proceedings should be drawn up against both parties and the party who is not proved to be in possession should be bound down. *A. I. R.* 1931 *Pat.* 347 = 133 *I. C.* 161 = 12 *P. L. T.* 533 = 1931 *Cr. C.* 795 = 32 *Cr. L. J.* 1014. See 9 *Luck.* 651.

V.—CONDITIONS REQUISITE TO GIVE JURISDICTION.

4. **Essentials to give Magistrate jurisdiction** [*P.* 255, *n.* 25]—This section is provided in order that a Magistrate may prevent a breach of the peace arising from a dispute as to immovable property. He has no jurisdiction in such a matter which primarily appertains to a Civil Court, unless he is fully satisfied that there is a danger of a breach of the peace and this must therefore be put in the forefront of his proceedings. *A. I. R.* 1933 *A.* 96 = 1932 *A. L. J.* 1037 = *L. R.* 14 *A. (Cr.)* 16 = 34 *Cr. L. J.* 449 = 142 *I. C.* 775 = 1933 *Cr. C.* 165 = 19 *A. I. Cr. R.* 68; *A. I. R.* 1933 *Oudh* 253 = 10 *O. W. N.* 310 = 34 *Cr. L. J.* 934 = 143 *I. C.* 299 = 1933 *Cr. C.* 559. A Magistrate should cancel the order initiating the proceedings if he is satisfied at any stage of the case from a police report or otherwise, that no dispute likely to cause a breach of the peace exists. *A. I. R.* 1929 *C.* 323 = 33 *C. W. N.* 399. If the parties have agreed to arbitration or to a compromise, there can be no question really of a breach of the peace. *A. I. R.* 1929 *Nag.* 285 = 121 *I. C.* 47 = 1929 *Cr. C.* 459.

VI.—LIKELIHOOD OF A BREACH OF THE PEACE.

5. **Meaning of "likely to cause breach of the peace"—must the danger be imminent?** [*P.* 255, *n.* 27]—The introduction of such words as "imminent" or "immediate" into the section giving it a stronger significance than the words used therein, is not justified. The section requires that there must be a present dispute and a likelihood of a breach of the peace. That is, there must be a present fear that it is probable that there will be a breach of the peace owing to the dispute, unless proceedings are taken under this section. Of course this does not mean that orders should be made when somebody comes and says that he fears that a breach of the peace will occur a considerable time ahead. The procedure under this section is intended to deal with conditions in which those responsible for law and order have an existing fear that unless steps are taken under this section, a breach of the peace will occur before they can prevent it. 35 *C. W. N.* 1003 = 1932 *Cr. C.* 8 = 136 *I. C.* 475 = 33 *Cr. L. J.* 305 = *A. I. R.* 1932 *C.* 60. Action under this section is not in the interests of any party, but to prevent a breach of the peace. If neither party intends to resort to civil remedy, the fact that there is time to do so, does not affect the likelihood of a breach of the peace. *A. I. R.* 1932 *Nag.* 134 = 28 *N. L. R.* 154 = 1932 *Cr. C.* 670 = 140 *I. C.* 231 = 33 *Cr. L. J.* 937; 53 *A.* 215. The Magistrate must be satisfied when drawing up proceedings that there exists a likelihood of a breach of the peace at the time of the order. An order made six months after the police report is bad. 58 *C.* 388.

VII.—NATURE OF INFORMATION OR REPORT ON WHICH MAGISTRATE MAY ACT.

6. **No hard and fast rule as to the materials or sufficiency of the information** [*P.* 257, *n.* 33]—The term "other information" is very elastic and gives the Magistrate the widest possible latitude in taking action. Each case must be dealt with on its own merits. The omission to use a technical term such as "affidavit," "evidence" or "verified statement" indicates that no restriction should be placed on the discretion of the Magistrate as to the information on which he is to act. Proceedings under this section are quasi executive and the powers of superintendence relating to the exercise of such discretion should be used sparingly. *A. I. R.* 1934 *Nag.* 194 = 35 *Cr. L. J.* 1460 = 151 *I. C.* 853 = 1934 *Cr. C.* 893; *A. I. R.* 1929 *C.* 468 = 49 *C. L. J.* 428 = 33 *C. W. N.* 858 = 30 *Cr. L. J.* 1027 = 119 *I. C.* 372 = 1929 *Cr. C.* 95.

7. **Police report—what it should contain.**—The police report to a Magistrate suggesting initiation of proceedings under this section is not and should not be confined to written reports which they themselves may have received. The police themselves must inquire whether a breach of the peace is likely and state the grounds for their reason and the result of their inquiry and not merely a copy of reports which they may have received that is to be communicated to the Magistrate. *A. I. R.* 1935 *Nag.* 78 = 17 *N. L. J.* 231. The report of the police is not binding on the Magistrate and he may, if he thinks proper, ignore it altogether and not take any action at all. (1934) *M. W. N.* 1285.

VIII.—EFFECT OF PRIOR ADJUDICATION BY COMPETENT COURT ON JURISDICTION OF MAGISTRATE TO INSTITUTE PROCEEDING.

8. **Whether decree of competent Court will negative existence of dispute** [*P. 258, n. 37*].—The words “dispute likely to cause a breach of the peace” do not refer only to *bonafide* disputes or only to reasonable disputes. The word “dispute” means actual disagreement existing between the parties at the time of the proceedings under s. 145, even though the question as to the right of possession has already been decided by a Civil Court. The likelihood of a breach of the peace is sufficient to give the Magistrate jurisdiction, the weight to be attached to the previous order of the Civil or Criminal Court being a question for the consideration of the Magistrate. The existence of such previous order does not also relieve the Magistrate from the obligation to receive all such evidence as may be produced when proceedings are taken under this section. *A. I. R. 1934 Pat. 471 = 15 P. L. T. 453 = 1934 Cr. C. 1064 following A. I. R. 1923 G. 610 and 1 P. L. J. 336 = A. I. R. 1916 P. 292 (F. B.)*

9. **Effect of institution of civil suit on proceedings under this section.**—The mere institution of a civil suit would not by itself be sufficient to justify the dropping of proceedings under this section. But it would be a waste of public time to allow parallel proceedings to go on simultaneously in Civil and Criminal Courts. Where the Civil Court has appointed a Receiver, the policy of the law is to give preference in matters of this nature to possession by a Receiver appointed by the Civil Court. The Receiver appointed by the Magistrate should therefore be discharged and the proceedings under s. 145 should be dropped in order to avoid unnecessary harassment to the parties and useless waste of time, money and energy. *A. I. R. 1935 Oudh 255 = 1935 O. W. N. 239 = 1935 O. L. R. 112 = 154 I. C. 121.*

IX.—THE “PROPERTY” WITHIN THE SCOPE OF THE SECTION.

10. **Disputes about crops or other produce of land** [*P. 262, n. 49*].—A lease of lac produce in a forest is lease of immovable property, within the meaning of this section. Lac itself may not be immovable property, but it can only be propagated on trees and is so connected with the trees that any dispute with regard to it must also involve a dispute with regard to land or right to enter upon the land for the purpose of taking lac. *A. I. R. 1934 Nag. 112 = 1934 Cr. C. 490 = 151 I. C. 343 = 35 Cr. L. J. 1331 = 30 N. L. R. 311 dissenting from A. I. R. 1920 C. 708.* The Court has no power to order delivery of the crops on the land harvested before the date of the preliminary order. “Crops or other produce” means crops or other produce attached to the land. (1934) *M. W. N. 405.*

X.—PARTIES CONCERNED.

11. **Representation of principal or master by agent, manager or servant** [*P. 264, n. 60*].—Where the real contesting persons were not joined as parties but the case proceeded between the agents of the parties and possession was ordered to be given to the master of one of the parties, the proceedings were irregular. The master of the other agent could not be considered to be bound by the order passed behind his back. The irregularity in such a case is not cured by s. 537. *1934 A. L. J. 650 = 1934 A. L. R. 1010 = 4 A. W. R. 396 = A. I. R. 1934 A. 853 = 36 Cr. L. J. 114 = 152 I. C. 500 = 1934 Cr. C. 1043.*

XI.—THE “POSSESSION” WITHIN THE SCOPE OF THIS SECTION.

(A)—WHAT CONSTITUTES POSSESSION.

12. **Delivery of possession through Court.**—On the date a person has been put into possession by the Civil Court, however inefficiently or irregularly, he has got possession as against others. The possession of the person dispossessed has been broken even if only for a moment. This is equally true of symbolical possession. *A. I. R. 1933 C. 424 = 1933 Cr. C. 622 = 144 I. C. 708 = 34 Cr. L. J. 810 following 56 C. 290 (F. B.); A. I. R. 1934 Nag. 217 = 17 N. L. J. 261 = 36 Cr. L. J. 52 = 152 I. C. 28 = 1934 Cr. C. 985. See also A. I. R. 1934 Pat. 563 = 15 P. L. T. 819 = 36 Cr. L. J. 146 = 152 I. C. 591 = 1934 Cr. C. 1218.* Once it is established that possession was delivered, that fact proves the possession of the party taking delivery on the date when it was delivered and raises a strong presumption in favour of the continuance of that possession unless the other side can show that subsequently they have succeeded effectively in displacing the holder of it and restoring their own possession. *A. I. R. 1933 Pat. 586 = 146 I. C. 631 = 1933 Cr. C. 1347 = 35 Cr. L. J. 154.* Where the Magistrate having found that *khas* possession did not pass to the applicants under the proceedings of the Civil Court, takes action under this section, he is not acting without jurisdiction. *A. I. R. 1932 Pat. 185 = 13 P. L. T. 178 = 1932 Cr. C. 418.*

13. **Actual possession may also include possession through others** [P. 267, n. 71]—The Trustee of a temple has authority over an archaka or pujari even if his post is hereditary and the archaka or pujari cannot set up that possession by him for his master or superior, as his own possession. The Trustee can set up that that possession is his own, though exercised for him by the servant. (1932) M. W. N. 1079 = 37 M. L. W. 143 = 5 M. Cr. C. 382 = A. I. R. 1933 M. 245 = 34 Cr. L. J. 88 = 140 I. C. 900 = 1933 Cr. C. 344.

(B)—EVIDENCE AS TO POSSESSION.

14. **How far evidence of title may be used in evidence to prove possession** [P. 268, n. 79]—Questions of title are of little importance under this section except in so far as they may be available to show who was in actual possession of the land at the time when proceedings are taken. A. I. R. 1934 C. 95 = 37 C. W. N. 849 = 1934 Cr. C. 81 = 147 I. C. 817 = 35 Cr. L. J. 489.

(C)—JOINT POSSESSION.

15. **Magistrate has jurisdiction in cases of exclusive possession of joint property** [P. 299, n. 81]—Even in cases covered by joint possession where one party is by some arrangement actually in physical possession of a certain part of the property, the Magistrate would have jurisdiction to decide who was in actual possession of that part. Where there is actual physical possession of definable and demarcated property, action under this section can be taken. A. I. R. 1934 Nag. 196 = 30 N. L. R. 300 = 35 Cr. L. J. 1384 = 151 I. C. 728 = 1934 Cr. C. 895. A quarter share in the annual produce of a mango grove cannot be held to be a specified or demarcated portion of it. A. I. R. 1935 Nag. 44 = 17 N. L. J. 216 = 1935 Cr. C. 254. Where one set of persons claim exclusive possession over a major portion of the land while the other set of persons claim to be in joint possession along with them of the entire land, it is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area and this section applies to such cases. 12 Pat. 87.

(D)—POINT OF TIME AT WHICH POSSESSION BECOMES MATERIAL.

16. **Proviso to cl. (4)—Should the date of dispossession be within two months of the application or of the preliminary order?** [See P. 270, n. 82]—In 52 M. 66 it was held that when an application was made by a person complaining of forcible dispossession, if, for no reason or fault of the applicant, the Magistrate is not able to pass a preliminary order within two months of dispossession, the party complaining would not, on a proper construction of the proviso, be made to suffer by reason of such delay on the part of the Magistrate and was entitled to an order under this section. It was held that though the words were capable of the interpretation that the dispossession must be within two months of the preliminary order, yet the intent and the object of the section must be kept in view before such interpretation was put on it. But a contrary view has been taken by some of the other High Courts, and it has been held that on a correct interpretation of the proviso, the only conclusion that can be drawn is that a person who has been dispossessed forcibly more than two months before the date of the preliminary order cannot derive any benefit under s. 145. It may be hard that a person who applies within a few days after his forcible dispossession should be deprived of his remedy simply because the Court did not make a preliminary order for a long time. But the remedy lies only in the hands of the Legislature. A. I. R. 1935 A. 38 = 1934 A. L. J. 1157 = 36 Cr. L. J. 102 = 152 I. C. 496 = 1935 Cr. C. 22. See also A. I. R. 1931 Nag. 38 = 26 N. L. R. 377 = 130 I. C. 153 = 1931 Cr. C. 222 = 32 Cr. L. J. 476 = 16 A. I. Cr. R. 80; A. I. R. 1933 Lah. 143 = 34 P. L. R. 365 = 142 I. C. 430 = 1933 Cr. C. 241; 5 Luck. 440.

XII.—PRELIMINARY ORDER.

(B)—CONTENTS OF THE PRELIMINARY ORDER.

17. **Magistrate cannot order that neither party shall enter the property.**—There is nothing in this section which authorises the Magistrate to direct that both parties be restrained from entering the property and its compound until further orders. Sub-section (4) proviso (2) gives power to the Magistrate to attach the property if there is an emergency, but to attach it, is not the same thing as ordering both parties to vacate it. Such an order is *ultra vires*. A. I. R. 1931 Rang. 81 (2) = 1931 Cr. C. 183 = 32 Cr. L. J. 637 = 131 I. C. 63.

18. **The order need not be self-contained—Reference to police report** [P. 272, n. 93]—Where the police report on which the order is based is explicit, the order may be upheld although the Magistrate himself did not state in express terms the grounds on which he was satisfied that a dispute existed. It

is nevertheless not desirable that the Magistrate's action should be based merely on a police report as giving information that a dispute likely to cause a breach of the peace exists, without stating the Magistrate's satisfaction that the report is correct. The provisions of sub-section (1) are clear and must be observed and the making of a preliminary order should not be allowed to lapse into mere routine as if it were the filling up of a printed form. *A. I. R. 1935 Nag. 78 = 17 N. L. J. 281.*

19. Mere omission to state the grounds, where there has been substantial compliance with the section will not vitiate the proceeding [*P. 273, n. 97*].—If the Magistrate omitted to record the grounds of his being satisfied of the likelihood of a breach of the peace in his order under sub-sec. (1) he did not by reason of that omission lose "Jurisdiction" to take further proceedings, although he was guilty of an omission or irregularity in procedure. The breach of a mandatory provision does not necessarily amount to such an illegality as vitiates the whole trial or proceedings. *54 A. 1002. S. 145 (1)* is not mandatory at all, except in this sense that the Court will set aside an order passed under the latter clauses if there is any reason to believe that the omission of an order or the passing of an order not strictly in terms of s. 145 (1) led to some prejudice to one or other of the parties. Still less is there any question of jurisdiction in the matter. *A. I. R. 1932 A. 446 = 1932 A. L. J. 503 = L. R. 13 A. (Cr.) 132 = 1932 Cr. C. 558 = 18 A. I. Cr. R. 225 = 141 I. C. 131 = 34 Cr. L. J. 486; A. I. R. 1932 Sind 145 = 26 S. L. R. 353 = 1932 Cr. C. 681; A. I. R. 1933 Pesh. 88 = 34 Cr. L. J. 1138 = 145 I. C. 868 = 1933 Cr. C. 1449.* The jurisdiction of the Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. His jurisdiction does not depend on how he proceeds. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. Therefore the omission on the part of the Magistrate to follow certain directions contained in the Code, although some of these directions may be more important than others, cannot be said to deprive him of jurisdiction. If the accused has not been prejudiced by the omission of the Magistrate to record the fact that he was satisfied as to the existence of a dispute likely to cause a breach of the peace and the grounds on which he was so satisfied, the irregularity committed by the Magistrate was cured by s. 537. *55 A. 301 (F. B.); A. I. R. 1934 Nag. 112 = 1934 Cr. C. 490 = 151 I. C. 343 = 30 N. L. R. 311 = 35 Cr. L. J. 1381. See A. I. R. 1935 Oudh 316 = 1935 O. W. N. 454 = 1935 O. L. R. 257 = 36 Cr. L. J. 656 = 153 I. C. 169.*

(C)—SERVICE OF THE PRELIMINARY ORDER.

20. Effect of notice not being served [*P. 273, n. 100*].—No *ex parte* proceedings are possible in cases where there is no service, which by itself is sufficient to vitiate all the proceedings under this section. *A. I. R. 1933 Lah. 145 = 1933 Cr. C. 267 = 143 I. C. 477 = 34 Cr. L. J. 616.*

XIII.—INQUIRY.

(C)—DUTY OF MAGISTRATE TO ASSIST PARTIES TO ADDUCE EVIDENCE.

21. Duty of Court to summon witnesses mentioned by the parties [*P. 277, n. 116*].—The direction in sub-section (4) to receive evidence, implies a duty on the Court to summon such witnesses as may be mentioned to the Court by either party. *82 A. 91.* It is incumbent on the Magistrate to receive all such evidence as may be produced by the petitioners and refusal to record evidence vitiates his order. (1934) *M. W. N. 693.* The Magistrate has no power to restrict the number of witnesses to be examined on each side. (1932) *M. W. N. 320.*

(D)—DEPUTING A MAGISTRATE TO MAKE INQUIRY.

22. How far a Subordinate Magistrate may be deputed to conduct the investigation [*P. 278, n. 117*].—S. 148 cl. (1) enables a District Magistrate or Sub-divisional Magistrate to direct a subordinate Magistrate to make a local inquiry and furnish him with a report for his guidance in the trial of the petition. But under the guise of calling for such a report he ought not to depute the Subordinate Magistrate for making the entire investigation and avoid the necessity for taking any oral evidence which the parties may wish to adduce in support of their respective claims. Any order passed by him without himself taking any evidence and depending solely on the report of the Subordinate Magistrate is one passed without jurisdiction. *A. I. R. 1932 M. 368 = 35 M. L. W. 390 = (1932) M. W. N. 425 = 5 M. Cr. C. 64 = 1932 Cr. C. 334 = 138 I. C. 68 = 33 Cr. L. J. 536 = 18 A. I. Cr. R. 317; (1934) M. W. N. 687.*

(F)—DEATH OF PARTIES.

23. Proceedings shall not abate by death [*P. 278, n. 122*].—Sub-section (7) empowers the Magistrate to cause the legal representatives of the deceased to be made parties and directs that the Magistrate shall thereupon continue the inquiry. To drop the proceedings merely because one of the parties died, is *ultra vires*. **A. I. R. 1934 C. 787 = 38 C. W. N. 724 = 153 I. C. 174 = 1934 Cr. C. 1209.**

(G)—REFERENCE TO ARBITRATION.

24. Reference to arbitration not proper [*P. 278, n. 123*].—Proceedings under this section cannot be submitted to arbitration. All that can be done is that in certain cases, the Court may appoint a commissioner or commissioners to conduct a local inquiry and to report as regards actual possession. **A. I. R. 1929 Nag. 235 = 121 I. C. 47 = 1929 Cr. C. 459.**

(H)—ATTACHMENT—PROVISO TO CLAUSE (4).

25. How attachment is to be effected.—The Code does not contemplate prohibitory order as the only mode of attachment under s. 88. Attachment may be made by taking possession or by appointment of a Receiver or by a prohibitory order. In cases of emergency a mere restraint on alienation would be generally of no use in preventing a breach of the peace which is the primary object of proceedings under s. 145. Any of the methods may therefore be adopted as may be considered appropriate for the object in view. **14 Lah. 618.**

26. Whether movable property on the premises can also be attached.—The expression "land or water" will not include movable properties situate on the premises to be attached. At the same time it cannot be held that when the Magistrate takes possession of immovable property in cases of emergency he should first remove the movable property therefrom or hand it over to one or other of the parties. Where the property is taken charge of by the police, the police-officers are entitled to retain custody of the movable property which was on the premises at the time of attachment subject to the final order of the Magistrate deciding the question of the possession of the property. **14 Lah. 618.**

27. Sub-section (8)—Sale of "produce of property."—The word "produce" is not necessarily confined to what is grown from the ground. It refers also to a finished article or a semi-finished article made from raw material. A sugar mill produces molasses and the molasses can be fairly called the produce of the mill. In the same way a flour mill produces flour and flour must be deemed to be the produce of a flour mill. **5 Luck. 462.**

(I)—RECEIVER.

28. Appointment of Receiver [*P. 279, n. 128*].—There is no provision for the appointment of a Receiver during the pendency of a dispute under s. 145. The appointment of a Receiver under s. 146 (2) can only be made after a final order has been passed under s. 146 (1) attaching the property. **(1933) M. W. N. 917; 10 Lah. 800.**

XV.—FINAL ORDER.

(B)—PERSONS BOUND BY THE FINAL ORDER.

29. Order binding on all persons who have notice [*P. 282, n. 145*].—The provision in sub-section (3) for affixture of at least one copy of the order in some conspicuous place at or near the subject of dispute is an indication that under certain circumstances the binding character of the order extends to persons other than the parties themselves. **A. I. R. 1930 C. 63 = 33 C. W. N. 1002 = 31 Cr. L. J. 945 = 125 I. C. 858 = 1930 Cr. C. 18.** An order made against a Hindu father who had acquired the properties as manager of the family is binding on the other members of the family. **52 M. 787.** Unless and until the final order is vacated in due course of law, fresh proceedings in respect of the same property between the same parties cannot be entertained. **18 Rang. 302.**

XIX.—REFERENCE.

30. No reference to be made merely upon a difference of opinion as to value of evidence or unless there is serious error of law.—In cases under s. 145, a reference ought not to be made merely upon a difference of opinion as to the value of the evidence. Even if there should appear to be an error of law, references should not be made unless it appears that it is of such a character as to call for interference. **58 C. 1081.**

XX.—REVISION AND POWERS OF THE HIGH COURT.

31. Order as to costs in revision [*P. 286, n. 170*].—S. 423 (1) (d) read with s. 439 does not authorise the High Court in revision to award costs of the proceedings before it. **55 A. 801 (F. B.)** But the High Court may pass an order for costs in respect of the proceedings before the Magistrate. An order for costs under

s. 148 (3) is an order "incidental" to an order for possession under s. 145. It follows therefore that such an order may be passed by the High Court in revision of an order passed by a Magistrate under this section. **11 Rang. 361 (F. B.)**

32. High Court will rarely interfere with findings of fact.—The High Court will rarely interfere on facts, with an order passed under s. 145 and 146. Where there was no question of law involved and even on facts, the reasons given by the Magistrate was not unsound or untenable, the High Court refused to interfere. **A. I. R. 1934 Pat. 33 = 35 Cr. L. J. 611 = 143 I. C. 193 = 1934 Cr. C. 20.** Where the Magistrate in his discretion considers the matter to be one of emergency, the action taken by him for maintenance of peace, cannot be lightly interfered with. **14 Lah. 615.** When the Magistrate thinks that no action is necessary for preserving the peace, it is not fit or proper that he should be directed by the High Court to take action. **(1934) M. W. N. 1285.** That the Magistrate has passed an order which would have been proper if he had drawn up the proceedings immediately on receipt of the police report but is not proper in consequence of the delay which took place before the drawing up of formal proceedings more than two months after the date of dispossession, is not a ground for interference in the absence of substantial injustice resulting from the Magistrate's order. **A. I. R. 1933 Pat. 601 (2) = 146 I. C. 551 = 35 Cr. L. J. 91 = 1933 Cr. C. 1363.**

XXI.—EFFECT OF ORDER UNDER THIS CHAPTER ON CIVIL PROCEEDINGS.

33. Possession of Receiver is possession on behalf of successful party [*P. 287, n. 180*].—The possession which the interim Receivers exercised may justly be regarded as possession on behalf of the party who eventually succeeded in civil proceedings. **53 C. 1070.**

SECTION 146.

I.—SCOPE OF SECTION.

Notes.—1. Fresh finding as to likelihood of breach of the peace not necessary [*See P. 289, n. 3*].—When under s. 145 (1) the Magistrate to whom a report is made by the police comes to a finding that he is satisfied as to the likelihood of a breach of the peace and issues notices to the parties, it is not necessary for the Magistrate to again come to a finding on this point in his subsequent order under this section. **A. I. R. 1932 A. 683 = 1932 Cr. C. 938 = L. R. A. 13 (Cr.) 151 = 18 A. I. Cr. R. 333 = 1932 A. L. J. 819.**

II.—WHEN ATTACHMENT MAY BE MADE.

2. Magistrate bound to take evidence before attaching property [*P. 290, n. 6*].—If the parties refused after ample time had been given them to adduce evidence, the Magistrate is not bound to make an inquiry on his own account. He is entitled to act on his apprehension of a breach of the peace founded on the police report and attach the property. **9 Pat. 639.**

3. Section inapplicable when both parties are in possession [*P. 290, n. 8 (b)*].—This section is applicable only if none of the contending parties is in possession, or if the Magistrate cannot determine who is in possession. When immovable property is in joint possession, action could and should be taken under s. 144 or under the security sections. **(1935) M. W. N. 367.** Where the dispute was between three brothers as to the actual possession of certain property, the question being whether the brothers were jointly entitled to the property or whether the particular property had fallen to the exclusive share of one of them by virtue of an alleged partition, the Magistrate was competent to attach the property under this section but the better procedure would be to take action under s. 107. **32 Bom. L. R. 340 = A. I. R. 1930 B. 172 = 31 Cr. L. J. 933 = 125 I. C. 718.** The words "unable to satisfy himself as to which of them was in possession" cover the case of two joint owners both in joint possession. If there are two joint owners in possession jointly, it is a case where the Magistrate cannot decide which of them was in exclusive possession. **A. I. R. 1932 A. 683 = 1932 A. L. J. 819 = 1932 Cr. C. 938 = L. R. 13 A. (Cr.) 151 = 18 A. I. Cr. R. 333.**

VII.—EFFECT OF ATTACHMENT AND RECEIVER'S APPOINTMENT.

4. Effect of attachment.—When property has been attached and a Receiver appointed under s. 146, (2) it may be taken that the property was in *custodia legis*, and the Magistrate was in the position of a stakeholder who must be taken to be holding the property for and on behalf of the person who ultimately establishes his claim in the Civil Court. **14 Lah. 414.** When a competent Court has determined the rights of the parties or the person entitled to possession of the lands in dispute, it is the duty of the Magistrate to

withdraw the attachment and to make over possession to such party. Any act done by the Receiver during the period of attachment cannot and ought not to prejudicially affect the rights of the party found by the Court to be entitled to possession. 12 Pat. 261.

5. **Receiver not to lease out the property to one of the parties to the proceedings.**—Where one of the parties with the connivance of the Receiver obtained by means of a fraud upon the Court, a lease of the property which he would not have otherwise got, the Magistrate is entitled to set aside the lease in a summary manner and to order its cancellation. (1932) M. W. N. 1154 = 36 M. L. W. 651 = A. I. R. 1933 M. 67 (2) = 5 M. Cr. C. 337 = 33 Cr. L. J. 956 = 140 I. C. 281 = 1933 Cr. C. 111.

SECTION 147.

I.—APPLICATION OF SECTION.

Notes.—1. **Danger of breach of the peace need not be imminent** [See P. 294, n. 5]—There is nothing in Ch. XII which states that the danger of a breach of the peace should be imminent. No case could ever be made legal under this Chapter if it was necessary that it should be impossible to have sufficient time to go to the proper Court, because obviously it is always as easy to file a plaint in a Civil Court as to file a complaint in a Criminal Court. The provisions of Ch. XII are intended to provide a speedy remedy in cases of disputes dealt with in that chapter in order that the matter may be settled temporarily, while more lengthy civil proceedings take place. 53 A. 215.

II.—WHAT RIGHTS MAY BE MADE THE SUBJECT-MATTER OF PROCEEDINGS.

2. **Meaning of the word "exercise" in the Proviso.**—"To exercise" means much less than successfully and completely to assert. The root meaning of "to exercise a right" is to take it out of its box and a very small gesture on the part of the people obstructed might be counted as exercise. A. I. R. 1931 M. 495 = (1931) M. W. N. 554 = 4 M. Cr. C. 215 = 32 Cr. L. J. 972 = 133 I. C. 5 = 1931 Cr. C. 559.

3. **The right must have been exercised within three months** [P. 295, n. 10]—The three months are not the three months prior to the order but three months next before the institution of the inquiry. A. I. R. 1930 A. 452 = L. R. 11 A. (Cr.) 35 = 31 Cr. L. J. 1217 = 127 I. C. 422 = 1930 Cr. C. 672 = 13 A. I. Cr. R. 190. Institution of the inquiry does not mean the date when formal proceedings are drawn up under the section. A. I. R. 1930 Pat. 349 = 31 Cr. L. J. 791 = 125 I. C. 143 = 1930 Cr. C. 721. The inquiry contemplated in the proviso to sub-sec. (2) is the inquiry referred to in sub-sec. (1); that is the date on which the parties are heard and evidence is taken and adjudicated upon. A. I. R. 1930 Pat. 291 = 31 Cr. L. J. 361 = 122 I. C. 145 = 1930 Cr. C. 608 = 14 A. I. Cr. R. 54.

4. **The right must have been exercised "on the last of such occasions before such institution."**—Where a party claiming a right of easement to let off water into another's land during the rains, was obstructed in the enjoyment of his right when the rains set in and he immediately took steps under this section to have the obstruction removed, but the Magistrate was unable to deal with the matter till the rains had finished it would be unreasonable to allow the opposite party to plead that he had successfully prevented the enjoyment of the right on the particular occasion immediately before the inquiry and that therefore the right of the applicant was barred. The words "on the last of such occasions before such institution" refer to the year previous to the institution, when the applicant might have asserted his rights. A. I. R. 1934 Pat. 557 = 15 P. L. T. 740 = 36 Cr. L. J. 106 = 152 I. C. 295.

5. **Should the non-exercise of the right be within the control of the person claiming the right** [P. 295, n. 10-A]—Where certain persons were restrained from exercising their right of thoroughfare by Magisterial order, it was held in Madras, *dissenting* from A. I. R. 1925 B. 536 = 89 I. C. 344 = 26 Cr. L. J. 1422 that they cannot be said to have exercised the right during the last occasion. There is no authority for importing a gloss into the proviso and adding to the words "unless the right has been exercised on the last of such occasions" the words "or its exercise on such occasions has been prevented by circumstances beyond the control of the parties seeking to exercise the right." A. I. R. 1931 M. 495 = (1931) M. W. N. 554 = 1931 Cr. C. 559 = 133 I. C. 5 = 4 M. Cr. C. 215 = 32 Cr. L. J. 972.

6. **Does the section apply to the "right to officiate" in a mosque or temple?** [P. 295, n. 11]—When there is dispute as to the possession of a temple and the right to perform puja therein, the Magistrate can deal with the claim as to the right to perform puja as part of the larger relief that is prayed for. If however, it is not so included in the major relief, it is doubtful whether an application under this section can lie merely as to the right to perform puja in a certain temple. (1932) M. W. N. 1079 = 37 M. L. W. 143 = A. I. R. 1933 M. 245 = 5 M. Cr. C. 382 = 34 Cr. L. J. 88 = 140 I. C. 900 = 1933 Cr. C. 344. Before the amendment of 1923 there was a conflict

of opinion between the Calcutta and the Madras High Courts. In the amended section the wider view of the Madras High Court was adopted and it was specifically noted that the provisions of this section would apply whether the right be claimed as an easement or otherwise. The provisions of this section can therefore be applied in the case of disputes as regards the entry into a temple or mosque. **A. I. R. 1930 A. 452 = L. R. 11 A. (Gr.) 35 = 31 Cr. L. J. 1217 = 127 I. C. 422 = 1930 Cr. C. 672 = 13 A. I. Cr. R. 190.**

7. Obstruction to use of water for irrigation [P. 296, n. 15]—It is not necessary for the Magistrate to find that a right of easement strictly so called was established. The section says “whether such right be claimed as an easement or otherwise.” All that he has to find is that the petitioner had been for a long time using the water flowing down the channel and had in fact used it during the last monsoon. **A. I. R. 1930 M. 865 = 59 M. L. J. 430 = 32 M. L. W. 175 = (1930) M. W. N. 987 = 3 M. Cr. C. 279 = 32 Cr. L. J. 215 = 129 I. C. 68 = 1930 Cr. C. 1121.**

8. Right to fisheries [P. 296, n. 18]—Fisheries to which one of the parties may have a right apart from any right to the land on which the fishery stands, may form the subject-matter of proceedings under this section. The subject-matter of proceedings under s. 145 if it relates to fisheries, must relate to the particular local area where the fishery extends. The difference is that under s. 147 the right may be a prescriptive right or right of easement to use of land not belonging to the parties but belonging to somebody else. Where one party claims the right to catch fish in waters upon the land of another, it is in the nature of an easement or profits a prendre and the proceedings come within the ambit of s. 147. **13 Pat. 153.** But none can acquire a right, exclusive against the public or any other person, to fish in any particular area of the open sea, or in that part of it, within three miles of the shore, known as territorial waters. No right can therefore exist for one party to restrain another party under this section from fishing in the sea except in a certain manner. **(1935) M. W. N. 181 = 41 M. L. W. 436 = 63 M. L. J. 417 = A. I. R. 1935 M. 350.**

III.—INQUIRY.

(A)—PROCEDURE.

9. Police-officer need not be examined as to the correctness of his report.—Where the only use that the Magistrate has made of the police report is the use contemplated by the section, *viz.*, making an order in writing requiring the parties to put in written statements, it is not necessary for him to call on the police-officer to give evidence in regard to the correctness of his report. **53 A. 215.**

(B)—NOTICE TO PARTIES AND EVIDENCE.

10. Order without notice under this section, illegal.—No order could be passed under this section when notice was not issued under this section but under s. 145. **A. I. R. 1933 Lah. 145 = 1933 Cr. C. 267 = 143 I. C. 477 = 34 Cr. L. J. 616.**

(D)—NATURE OF ORDER.

11. Competence of a Magistrate to direct removal of obstruction [P. 298, n. 33]—Under s. 36, Easements Act, notwithstanding the provisions of s. 24, the dominant owner could not himself abate a wrongful obstruction of an easement. Where therefore it is clear that any breach of the peace that may have ensued would have been the result of the petitioner's own illegal action in removing the obstruction, an order against the opposite party directing the removal of the obstruction would be unsustainable. **A. I. R. 1932 Nag. 83 = 15 N. L. J. 28 = 1932 Cr. C. 433 = 133 I. C. 38 = 33 Cr. L. J. 556 = 18 A. I. Cr. R. 289.** But in **A. I. R. 1933 C. 752 (1) = 34 Cr. L. J. 1230 = 146 I. C. 186 = 1933 Cr. C. 1254**, it was held that a direction to a party to remove an obstruction was the same thing as “prohibiting any interference with the exercise of such right” indicated in sub-section (2) and such an order was quite valid. But in a later decision of the Calcutta High Court it was held that sub-section (2) contemplates only a prohibitory order and not a mandatory order to do some positive act. **A. I. R. 1934 C. 556 = 38 C. W. N. 476 = 35 Cr. L. J. 1093 = 150 I. C. 600 = 1934 Cr. C. 789 = 21 A. I. Cr. R. 282.** It has been held by the Madras High Court following **26 M. L. J. 322 = 15 Cr. L. J. 362** that an order prohibiting the interference with the exercise of the right is valid and what might in effect amount to a mandatory injunction, is permissible. The amendment of s. 147 has not in any way made the view held in **26 M. L. J. 233** inapplicable: **59 M. L. J. 430 = 32 M. L. W. 175 = (1930) M. W. N. 987 = A. I. R. 1930 M. 865 = 3 M. Cr. C. 279 = 32 Cr. L. J. 215 = 129 I. C. 68 = 1930 Cr. C. 1121.** Where the right found to exist was a right to the water coming down a stream and it was indispensable to the exercise of that right that the cutting in the bank made by the other party should be closed, an order restraining them from preventing its closure is in no sense a mandatory injunction. **A. I. R. 1929 Pat. 351 = 10 P. L. T. 376 = 1929 Cr. C. 153.**

12. Interim order cannot be passed.—There is no provision under this section for passing an interlocutory order that till the decision of the case the party against whom application is made shall not in any way interfere with the exercise of the alleged right. Such an order in terms is nothing short of the final order contemplated by sub-section (2). *A. I. R. 1932 Nag. 83 = 15 N. L. J. 28 = 1932 Cr. C. 483 = 138 I. C. 38 = 33 Cr. L. J. 556 = 18 A. I. Cr. R. 289.*

SECTION 148.

COSTS.

Notes.—1. What costs may be directed to be paid [*P. 300, n. 9*].—The value of the property should not be taken as the fair test of the costs which should be awarded in a case where the case lasted very long but for which neither party was responsible. *53 A. 172.* It is extremely difficult to prove the exact sum spent in costs in a semi-criminal case such as one under s. 145. In such cases the Court may very well use its discretion in awarding an amount which it considers reasonable. *A. I. R. 1932 A. 325 = L. R. 13 A. (Cr.) 98 = 135 I. C. 246 = 33 Cr. L. J. 157 = 1932 Cr. C. 294 = 18 A. I. Cr. R. 47.*

2. When costs to be awarded [*P. 300, n. 10*].—Sub-section (3) does not fix any time-limit for passing the order as to costs. An order for costs passed two days later, after the decision of the main case cannot therefore be said to be an illegal order. *55 A. 301 (F.B.).*

3. Award of or assessment of costs must be made after notice to the party affected [*P. 301, n. 14*].—Although sub-section (3) does not expressly state that a party should have an opportunity of being heard before an order for costs is passed against him, yet, in accordance with the ordinary principles of justice the Magistrate should not pass the order without giving the person affected an opportunity of showing cause against it. *55 A. 301 (F.B.).* There is no necessity to treat the question of costs as a separate issue upon which a separate judgment must be given. But the question of costs must be determined judicially and upon proper materials. If the Magistrate when giving his decision on the merits there and then makes an order for costs, the party affected may at that time show cause against the making of such order, but if the Magistrate reserves judgment without mentioning his intention to order costs, it is his duty to give notice to the party against whom it is intended to make the order, to show cause against it. *A. I. R. 1934 C. 95 = 37 C. W. N. 849 = 1934 Cr. C. 81 = 147 I. C. 817 = 35 Cr. L. J. 489; A. I. R. 1934 C. 80 (1) = 37 C. W. N. 852 = 1934 Cr. C. 85 = 147 I. C. 800 = 35 Cr. L. J. 478.*

Power of High Court to order costs.—*See note 31 to s. 145.*

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

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SECTION 151.

Note.—Where no emergency is shown to have existed, an attempt to arrest on the part of a police-officer is not only not strictly justifiable by law but is illegal and resistance to such arrest is not punishable. *A. I. R. 1930 Lah. 343 = 31 P. L. R. 285 = 31 Cr. L. J. 294 = 121 I. C. 734 = 1930 Cr. C. 396 = 13 A. I. Cr. R. 410.*

CHAPTER XIV.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

SECTION 154.

FIRST INFORMATION.

Notes.—1. First information—Need not necessarily be first in point of time [*See P. 304, n. 2*].—It was never meant to be laid down that any sort of information would fall under s. 154 so long as it was the first in point of time. Firstly it must be an information, and secondly it must relate to a cognizable offence on the face of it and not merely in the light of subsequent events. The fact of the officer starting an investigation is not the sole criterion of a first information, for under Ch. XIV the officer may investigate a non-cognizable offence on the order of a Magistrate, etc. Information, under s. 154 may be recorded even in the course of an investigation. From that information investigation begins into the cognizable offence divulged by the information and prior statements made to the police-officer are not excluded from evidence under s. 162. *58 C. 1312.*

2. "Relating" to the commission of a cognizable offence.—By the word "relating" is meant that there need not be complete or satisfactory proof or evidence given at the time. It is sufficient if it indicates that a cognizable offence has been committed. But until there is this indication, it cannot be said that the information is one "relating" to such an offence. 58 C. 1312.

3. First information not by itself evidence [P. 305, n. 4].—The first information report is not a substantive piece of evidence. It can be used merely by way of corroboration or contradiction and not any further. It is inadmissible for the purpose of proving that the facts stated in it are correct. It cannot be used to contradict other witnesses who are unanimous on a particular fact. It is never *per se* the statement of the case for the prosecution and the absence of the accused's name in the first information report is not by itself sufficient proof of his innocence. 7 Luck. 552; A. I. R. 1933 Pesh. 94 = 35 P. L. R. 132 = 1934 Cr. C. 47 = 147 I. C. 572. The statements in the first information report are not substantive evidence at all. They can only be used for the purpose of corroborating or contradicting what the complainant has stated on oath in evidence before the Court. A. I. R. 1934 Rang. 60 = 35 Cr. L. J. 308 = 143 I. C. 876 = 1934 Cr. C. 377; A. I. R. 1934 Nag. 94 = 30 N. L. R. 262 = 35 Cr. L. J. 957 = 149 I. C. 447 = 1934 Cr. C. 377; A. I. R. 1934 Pesh. 27 = 35 Cr. L. J. 961 = 143 I. C. 1043 = 1934 Cr. C. 523 = 21 A. I. Cr. R. 252. If the first information is given by the accused to a police-officer and that information admits his own guilt it amounts to a confession which is inadmissible in evidence under s. 25, Evidence Act. 59 B. 120.

SHALL BE SIGNED.

4. Signature of informant is essential.—This section was not intended to apply to a telephone message because the information can hardly be read over to the informant and cannot be signed by him. Moreover the information must relate to a cognizable offence. Where the message only stated that there was someone in the hospital with a hatchet wound and there was no mention of an offence having been committed, it is impossible to treat it as a first information report. A. I. R. 1931 Sind 13 = 1931 Cr. C. 61 = 130 I. C. 378 = 32 Cr. L. J. 543 = 16 A. I. Cr. R. 1. A telegram to the police sent by the complainant cannot be treated as a first information report, as it is not signed by the informant as required by this section. 39 C. W. N. 403 = A. I. R. 1935 C. 403. But where the original of the telegram sent by the complainant to the police was duly thumb-marked by the complainant and its authenticity was confirmed, it became a written statement complying with the requirements of this section. 15 Lah. 314.

SECTION 155.

Notes.—1. Sub-section (2)—Magistrate having power to try such case.—A Magistrate otherwise empowered to order investigation does not lose that power merely because the offence involved cannot be tried by him without previous complaint by the Local Government under s. 196. The possession of the power to try is distinct from the exercise of that power. A. I. R. 1932 Lah. 581 = 33 P. L. R. 824 = 33 Cr. L. J. 678 = 138 I. C. 751 = 1932 Cr. C. 809 = 19 A. I. Cr. R. 37.

2. Sub-section (3)—Police procedure when investigation ordered [P. 311, n. 8].—An investigation held under this chapter would include investigation held under s. 155 (3) under the order of a Magistrate. If the Magistrate had empowered the police to investigate into a non-cognizable offence, the authority of the police does not terminate with the investigation but the police can exercise the powers conferred on them by s. 170. 53 A. 407.

SECTION 156.

Note.—Powers of the police under this section not affected by Magistrate's reference under s. 202 for investigation.—Where a Magistrate on receipt of a complaint of a cognizable offence, directed an investigation to be made by a police-officer, the police are entitled after investigation to send up the case for trial under a charge-sheet as if they had taken cognizance of it under their ordinary powers of investigation. The powers of the police under this section are not affected when an order to investigate under s. 202 is made. 14 Lah. 194 dissenting from 35 B. 339. Because a complaint has been sent to a police-officer to investigate a case, it does not deprive the police of their right to investigate a cognizable offence independent of the complaint. A. I. R. 1932 Pat. 72 = 12 P. L. T. 937 = 1932 Cr. C. 136 = 136 I. C. 842 = 33 Cr. L. J. 349. The wording of sub-section (3) is wide and the utility of it would be much diminished if it were held to apply only to those cases in which a Magistrate takes cognizance on his own knowledge or suspicion. A. I. R. 1933 Sind 136 = 27 S. L. R. 67 = 34 Cr. L. J. 763 = 144 I. C. 409 = 1933 Cr. C. 334.

SECTION 157.

Note.—Effect of omission to send report to Magistrate [*P. 316, See n. 4*].—The object of the provision is to enable the Magistrate to have immediate notice of every serious crime so that he may be able to act if necessary under this section. But failure on the part of the police to report to the Magistrate, cannot prejudice the accused. The report under this section is not a public document. *A. I. R. 1931 Pat. 150 = 12 P. L. T. 393 = 131 I. C. 17 = 1931 Cr. C. 390 = 32 Cr. L. J. 638 = 15 A. I. Cr. R. 508.*

SECTION 159.

Note.—The mere fact that the inquiry was not held by a particular officer as suggested by the Magistrate, does not make the submission of the charge-sheet on the part of the investigating police, contrary to the provisions of the Code. *62 C. 469.*

SECTION 162.

Notes.—1. **Scope of the section**—Not applicable to police in the Towns of Bombay and Calcutta.—Section 1, sub-sec. (2) specifically lays down that nothing contained in the Act shall apply to the police in the town of Bombay. The provisions of s. 162 cannot therefore apply to a statement made to a Bombay police-officer. S. 63 of the Bombay City Police Act, 1902 is identical with the terms of the section of the old Criminal Procedure Code and according to the decisions under that section, although the use of the written record of the statement of the witness is prohibited, the statement can be proved by oral evidence and is admissible under s. 157, Evidence Act. *54 B. 528.* The section does not apply to the Calcutta police. *33 C. W. N. 203 = A. I. R. 1929 C. 287 = 30 Cr. L. J. 577 = 116 I. C. 160 = 12 A. I. Cr. R. 443.*

2. **Section does not apply to statements taken by investigating officer under Ch. VIII.**—The investigation under this section refers to an investigation with regard to the commission of either a non-cognizable offence under the order of a Magistrate under s. 155 (2) or a cognizable offence in which a police-officer is entitled to investigate under s. 156. There is no provision in Ch. VIII for making any preliminary investigation by the police. The investigation, if any, made with respect to proceedings under Ch. VIII does not fall within the investigation relating to offences under Ch. XIV. *A. I. R. 1932 B. 196 = 34 Bom. L. R. 258 = 33 Cr. L. J. 797 = 139 I. C. 623 = 1932 Cr. C. 300.* The inquiry under Ch. VIII is not an inquiry into an "offence" and therefore this section cannot be used to shut out statements given to the police by persons who are afterwards called as witnesses. *56 M. 687.*

3. **Section applies only to statements made in the course of investigation.**—This section does not apply to statements made in connection with another offence at a time when the offence under investigation was not committed. The present amendment of the section makes this quite clear. *A. I. R. 1932 A. 442 = 1932 A. L. J. 301 = 34 Cr. L. J. 109 = 140 I. C. 578 = 1932 Cr. C. 562; 56 M. 154.* Statements in the police diary are ordinarily privileged and cannot be given to outsiders except under s. 162 and that is limited to the case of an accused who is being tried for an offence under investigation at the time when the statement was made. *A. I. R. 1935 Nag. 23 = 1935 Cr. C. 111.* Statements made not in the course of an investigation, but before it, does not come within the prohibition of this section. *57 B. 400.* But in certain circumstances, information under s. 154 may be recorded in the course of an investigation. From that information, investigation begins into a cognizable offence divulged by it and statements made to the police prior to such information and recorded in the Station diary is not excluded by this section. *58 C. 1312.* Where a girl was taken away from her husband's place in the Moradabad District and some months later she was discovered in Delhi with the accused, and the Sub-Inspector at Delhi recorded a statement from her, it was held that the statement was inadmissible in a prosecution under s. 366, I. P. C., as the Sub-Inspector at Delhi could have investigated the case under s. 156 (1). *55 A. 979.* A list of ornaments stolen during a dacoity which was given to a police-officer in the course of investigation is inadmissible in evidence. *A. I. R. 1929 C. 448 = 31 Cr. L. J. 127 = 120 I. C. 453 = 1929 Cr. C. 71.* But where a complaint of dacoity was laid against the accused and when a police-officer went to the place, certain lists of stolen property were prepared in his presence two days after the occurrence, it was held that at that stage the investigation was merely in a preliminary stage and the list was prepared before the investigation actually began and it cannot be excluded from evidence under this section. *A. I. R. 1931 Oudh 83 = 8 O. W. N. 31 = 32 Cr. L. J. 630 = 131 I. C. 72 = 1931 Cr. C. 211.* A list of the kind should be regarded as an addition to the first report. *A. I. R. 1931 Oudh 74 = 7 O. W. N. 456 = 31 Cr. L. J. 1017 = 126 I. C. 493 = 1931 Cr. C. 130; A. I. R. 1933 Lah. 987 = 1933 Cr. C. 1503.*

STATEMENTS MADE TO POLICE-OFFICERS.

4. Statement made to the police, not to be signed.—Getting the person making a statement to the police to sign the same, is not a mere irregularity, but a clear illegality, being a direct breach of a mandatory provision of the law. Even if it be a mere irregularity it is not one which can be cured under s. 537. The policy underlying the rule that the statement shall not be signed, seems to be that witnesses at the trial should be free to make any statements in favour of the accused which they wish to make, unhampered by anything which they might have said or might have been made to say to the police. If their signatures are obtained, the result would be to give them an impression that they were not free to make a different statement. **6 Luck, 663.** But such an irregularity by itself would not be a sufficient ground to quash the conviction. To some extent it may impair the value of the evidence given by the witnesses affected by it. **A. I. R. 1934 Sind 73 (2) = 35 Cr. L. J. 1170 = 130 I. C. 917 = 1934 Cr. C. 737.**

5. Statement made to Excise Officer.—An Excise officer is not to be regarded as a police-officer for the purposes of this section. **61 C. 967; 52 C. L. J. 177 = A. I. R. 1930 C. 710 = 32 Cr. L. J. 231 = 129 I. C. 101 = 1930 Cr. C. 1110.**

ADMISSIBILITY IN EVIDENCE OF STATEMENTS OF WITNESSES TO POLICE.

6. Inadmissibility of writing containing statement against the accused [P. 325, n. 6]—It is contrary to law to make use of the police diary for the purpose of corroborating the evidence of prosecution witnesses as given in Court. **A. I. R. 1931 Pat. 96 = 11 P. L. T. 837 = 131 I. C. 535 = 32 Cr. L. J. 735 = 1931 Cr. C. 192 = 16 A. I. Cr. R. 343; 56 M. 231.** A statement made to the police cannot be used for contradicting a defence witness. **4 Luck. 726.** The words "any purpose" includes purposes of prosecution or defence. **(1931) M. W. N. 715 = 34 M. L. W. 388 = 62 M. L. J. 71 = A. I. R. 1931 M. 779 = 4 M. Cr. C. 306 = 33 Cr. L. J. 132 = 135 I. C. 364 = 1931 Cr. C. 1035.** The language covers all cases of any use of the statements to the investigating officer except as therein provided. **55 A. 639.**

7. Oral evidence whether admissible [P. 326, n. 9]—Oral evidence cannot be given of statements made to the police. **57 B. 400.** S. 162 was intended to prevent the user of statements by the accused to the police, and questions designed to show, by process of elimination that matters subsequently mentioned by the accused were omitted from such statements, are within the mischief aimed at by the section. **55 B. 435.** But in a case where a suggestion was made at the trial that the offence might have been committed by a person other than the accused and the Sub-Inspector who investigated the case deposed that he received no information to that effect during the investigation, this section was held not to prevent the police-officer from explaining his conduct by such a statement. **A. I. R. 1931 Lah. 177 = 1931 Cr. C. 297 = 131 I. C. 276 = 32 Cr. L. J. 682 = 16 A. I. Cr. R. 312; A. I. R. 1930 Lah. 484 = 31 P. L. R. 185 = 31 Cr. L. J. 442 = 122 I. C. 568 = 1930 Cr. C. 596 = 14 A. I. Cr. R. 263.** This section does not shut out a statement by the investigating police-officer that the story as was put forward by the witnesses was never stated to him while he was investigating. To hold that this section makes such a statement inadmissible, would mean going beyond the intention of the section and would render it practically impossible to do justice. **A. I. R. 1934 Nag. 138 = 1934 Cr. C. 569; 56 C. 1106.** The prosecution is not entitled to ask a prosecution witness what statement he made to the police or whether he made a certain statement to the police. There is however nothing in the section to prevent the question being put whether the witness made any statement to the police or whether he was questioned by the police. **A. I. R. 1933 Nag. 384 = 30 N. L. R. 55 = 1933 Cr. C. 1577.**

8. Statement identifying accused at a test identification is inadmissible.—A statement, express or implied, which a witness must have made by way of identifying the accused, is hit by the provisions of this section and is inadmissible in evidence. **39 C. W. N. 493 = A. I. R. 1935 C. 311.** But see **A. I. R. 1929 Nag. 36 = 29 Cr. L. J. 963 = 112 I. C. 51 = 11 A. I. Cr. R. 302.**

9. Judge cannot put questions introducing evidence not admissible under this section.—The power conferred on a judge under s. 165 of the Evidence Act to ask any question he pleases in order to obtain proper proof of relevant facts, could not be exercised for the purpose of introducing evidence in contravention of the law, viz., s. 162 of the Criminal Procedure Code. **58 C. 1009.**

10. Statement can be used only to "contradict" the witness.—Where the defence wanted to file the statements of the witnesses to the police in order to show that when examined by the police they did not attribute any particular act to any particular accused and to show that it was a "development" of the

prosecution case, *held* that the statement under s. 162 cannot be used for such purpose. It can only be used in order to show that the witness in the box is contradicting something he has said before. An *omission* from a statement under s. 162 cannot be said to be a *contradiction* of a statement made in the witness-box. 56 M. 475.

11. **Effect of infringement of the provisions of this section** [P. 327, n. 11]—The infringement of the provisions of this section is only an irregularity which can be cured under s. 537 if there has been no failure of justice occasioned thereby. 54 B. 934.

PRODUCTION, INSPECTION AND COPIES OF WRITTEN STATEMENTS.

12. **Procedure for production and use of record of statements** [P. 327, n. 12]—The words "the Court shall on the request of the accused refer to such writing" mean that where a witness is called and the statement to the police is made the subject of cross-examination, then the Court should make a reference to that written statement and make a note of what it actually says. It is not proper to rely on the memory of a witness as to what he thinks many months afterwards he stated to the investigating officer. 55 A. 689. On the request of the accused the Judge or Magistrate must refer to the statement of a witness to the police, if it has been reduced to writing, whether that statement is separately recorded or recorded in a police diary. He has no authority to look at the police papers unless requested to do so by the accused. The purpose of referring to such statement is in order to see whether any part of the statement ought to be excluded under the second proviso to the section, and not for the purpose of deciding whether there is any variation between the examination-in-chief and the statement recorded by the police. Subject to any part being excluded under the second proviso to the section, the accused is entitled to a copy of the whole of the statement to the police. 13 Rang. 1; A. I. R. 1931 A. 273 = L. R. 12 A. (Cr.) 36 = 32 Cr. L. J. 370 = 129 I. C. 267 = 1931 Cr. C. 337 = 15 A. I. Cr. R. 229; A. I. R. 1934 Nag. 138 = 1934 Cr. C. 569; 8 Pat. 279; 6 Rang. 672. Subject to s. 145, Evidence Act, it is for the accused or his pleader to decide in what manner and to what extent he will use the statement for the purpose of cross-examination, which must however be confined to alleged contradictions. 13 Rang. 1.

13. **Proof of and essential formalities for using the statement** [P. 327, n. 13]—To show in an affirmative manner that the prosecution witnesses cannot be relied upon, it is the duty of the defence to prove through the investigating police-officer when he is in the witness-box the record of the statements made to the police by the prosecution witnesses during investigation and for that purpose it is necessary to get on the record a true copy of the case diary. Though it may be necessary in very special circumstances to allow the investigating officer to be cross-examined, the above procedure is the one ordinarily to be adopted. 35 C. W. N. 164 = 1931 Cr. C. 806 = 32 Cr. L. J. 1245 = 134 I. C. 763 = A. I. R. 1931 C. 622.

The procedure followed in Behar and in Bengal is that after the attention of the prosecution witnesses has been drawn to the contradictory statements made by them before the police, the investigating police-officer is asked whether those witnesses did or did not make the particular statements before him. The answer given by the police-officer (which is always checked with reference to what is written in the diaries) is considered quite sufficient to contradict the witness and neither the original record of the statement in the police diary nor the copy of it furnished to the accused is ever proved or admitted in evidence. This procedure is in accordance with law. 10 Pat. 107. In A. I. R. 1933 Pat. 589 = 14 P. L. T. 543 = 1933 Cr. C. 1350 = 147 I. C. 142, it was however held that when it is sought to contradict a witness for the prosecution by reference to a previous statement recorded by the police, it is essential that the attention of the witness should first be drawn to the alleged discrepancy by showing or reading to him the record of the statement and affording him an opportunity to explain it. When this has been done the written record of the statement must be proved before the discrepancy, if any, can be relied upon as a contradiction.

The Lahore High Court has laid down the following procedure for the guidance of Subordinate Courts. If the witness when asked if he made the statement actually recorded by the police, replies in the affirmative, the record of the statement need not be proved and the cross-examiner may, if he chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in re-examination. If on the other hand, the witness denies having made the previous statement or says he does not remember having made such a statement and it is desired to contradict him, the cross-examiner must put to the witness the relevant portion or portions of the record containing the alleged contradiction and give him an opportunity to reconcile the same if he can. If so done, the previous statement becomes admissible for the purpose of contradiction and

may be proved. The proper manner of proving the statement is for the accused or his Counsel to mark the passages in the copy from the police diaries given to him and the writer of the statement asked to say that it is a true copy. *A. I. R. 1932 Lah. 103 = 135 I. C. 209 = 1932 Cr. C. 123 = 33 Cr. L. J. 97 = 33 P. L. R. 891; 11 Lah. 460.*

Those parts of the statement which are to be used for contradicting the witness can ordinarily be proved by the admission of the witness that he made the statement or by the examination of the police-officer who recorded it. In the latter course, in order to avoid delay there can be no objection to allowing cross-examination subject to subsequent proof of the statement. **13 Rang. 1.**

Only those portions of the statements as had been actually used under this section to contradict the witness, are parts of the judicial record and could be treated as evidence in the case. The other parts of the statements could not be relied upon by the prosecution or the defence and ought not to be referred to by the Judge. *A. I. R. 1930 Lah. 449 = 31 Cr. L. J. 199 = 121 I. C. 66 = 1930 Cr. C. 553.* Where the witness was only asked "Is this your statement to the Police?" and the witness merely stated that it was, it was held that there was no compliance with s. 145, Evidence Act. The witness should be informed of the part of his statement which is to be used to contradict him and he should be given an opportunity of explaining what he meant by that portion of his statement. *A. I. R. 1934 A. 956 = 4 A. W. R. 1 = L. R. 15 A. (Cr.) 157 = 1934 A. L. R. 1071 = 36 Cr. L. J. 188 = 152 I. C. 873 = 1934 Cr. C. 1258 = 21 A. I. Cr. R. 272.*

14. Proviso—Right of accused to production and getting copies of statements [*P. 328, n. 14*].—Even when there is only a memorandum and not a full statement, the Court is under an obligation to provide the accused with a copy. The object of the law is to enable the accused to contradict a witness in Court by making use of a previous statement of his and the memorandum in the police diary may be just as effective for that purpose as a full statement would be. *53 A. 458; A. I. R. 1933 Nag. 4 = 28 N. L. R. 291 = 34 Cr. L. J. 127 = 140 I. C. 825 = 1933 Cr. C. 63 = 19 A. I. Cr. R. 244.*

15. Whether accused is entitled to a copy if it is a "Joint statement."—It is a little difficult to say what a "joint statement" means. If it means that more than one statement is contained in one document or that a number of statements have been recorded *seriatim*, then there is no objection to the defence being allowed to see and use the statement of the particular witness. If, on the other hand, a joint statement means that the stories told by a number of witnesses have been, so to speak, boiled down by the police-officer into a statement of his own, which is a kind of abstract of the statements made by the several witnesses, the defence cannot be allowed to use such a statement. *A. I. R. 1932 C. 375 = 36 C. W. N. 106 = 1932 Cr. C. 318 = 139 I. C. 245 = 33 Cr. L. J. 725.* Where a statement of a witness to the police was recorded jointly with another witness who was tendered for cross-examination but was not cross-examined, *held*: that the Court was justified in refusing to grant a copy. *A. I. R. 1930 Lah. 457 = 31 Cr. L. J. 444 = 122 I. C. 491 = 1930 Cr. C. 561 = 14 A. I. Cr. R. 266.*

16. Second proviso—nature of statement to be excluded.—Under the second proviso the Judge or Magistrate should exclude from the copy supplied, any part of the statement which in his opinion satisfies one or other of two conditions, *viz.*, (1) that it is irrelevant, or (2) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. Under the second condition the two circumstances mentioned therein must exist together in conjunction. **13 Rang. 1.** The mere fact that the statement of the witness before the police does not in the opinion of the trying Magistrate contradict the evidence of the witness in Court, is no reason for refusing to grant the copy. *A. I. R. 1930 Sind 153 = 24 S. L. R. 239 = 31 Cr. L. J. 592 = 123 I. C. 689 = 1930 Cr. C. 617; A. I. R. 1929 Nag. 172 = 30 Cr. L. J. 728 = 117 I. C. 213 = 1929 Cr. C. 47. See note 12, *supra*.*

17. When accused should apply for copy [*P. 328, n. 14 (c)*].—The time when the application should be made is "when any witness is called for the prosecution." The section does not authorise the granting of copies after the evidence of the witnesses has closed. *56 A. 750.* The accused is entitled as of right to obtain a copy, not when the witness has been examined but as soon as he is "called" for the prosecution. Copies of the statements should be granted before the examination commences provided that an application therefor has been made in time. *A. I. R. 1934 Nag. 138 = 1934 Cr. C. 569; A. I. R. 1929 Nag. 172 = 30 Cr. L. J. 728 = 117 I. C. 213 = 1929 Cr. C. 47.* The accused may apply for a copy at any time after the witness has entered the witness-box and while he is giving evidence and the cross-examination of the witness must be adjourned until the necessary copy has been given. It will however be a sufficient compliance with the law to allow the defence pleader to see the original statement of the witness, if there is nothing in it to be excluded

under the second proviso and to cross-examine the witness thereon while the copy is being prepared. **13 Rang. 1.** There is nothing in the proviso to s. 162 to support the view that the right to receive copies would only arise in case the defence is able to show by cross-examination that there is some suggestion of contradiction by the witness of what he stated in the police inquiry. It would be manifestly impossible for a defence Counsel to establish some kind of contradiction in regard to a statement of the nature of which he was not aware. To impose such a condition would be to hinder the defence Counsel in performing a duty to his client, for which provision has been made in this section. **53 A. 94.** So far as proceedings before charge are concerned, copies should not be granted until the stage of cross-examination is reached. But if that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. **A. I. R. 1930 M. 185 = (1929) M. W. N. 885 = 31 M. L. W. 241 = 2 M. Cr. C. 243 = 31 Cr. L. J. 414 = 122 I. C. 463 = 1930 Cr. C. 185 = 14 A. I. Cr. R. 165.**

STATEMENTS OF ACCUSED PERSONS.

18. Does this section apply to statements made by an accused person? [*P. 328, n. 16*].—According to the Madras High Court, the expression "statement made by any person" includes a statement made by a person accused of the offence under investigation. There is nothing in the section itself to throw any doubt upon that clear and obvious meaning. The general rule therefore is that statements made by accused persons to the police in the course of an investigation cannot be proved. This, however, does not affect the special exception to that rule remaining by force of s. 27, Evidence Act. **55 M. 903 (F. B.) dissenting from 5 Pat. 63, 7 Lah. 84; 4 Rang. 72 (F. B.) and 54 C. 237 and approving A. I. R. 1931 M. 779 = (1931) M. W. N. 715 = 34 M. L. W. 388 = 4 M. Cr. C. 306 = 1931 Cr. C. 1035 = 62 M. L. J. 71 = 33 Cr. L. J. 132 = 135 I. C. 364.** This section applies to the statements made by an accused person who afterwards gives evidence as an approver. **9 Pat. 577.**

According to the Allahabad High Court, s. 162 does not apply to statements made by accused persons. To hold otherwise would be to alter the provisions of s. 27, Evidence Act which the Legislature did not contemplate. Under s. 1, sub-section (2), nothing in the Code shall affect any special or local law now in force and the Evidence Act is a special law. **55 A. 443. See also A. I. R. 1933 Nag. 136 = 29 N. L. R. 281 = 34 Cr. L. J. 505 = 1933 Cr. C. 610 = 143 I. C. 17,** where it was held that a perusal of sections 160, 161, 170 and 173 together leaves no room for doubt that the statements which are contemplated by s. 162, refer to statements other than those made by the accused. *See also* **24 N. L. R. 158 = A. I. R. 1929 Nag. 17 (2) = 30 Cr. L. J. 288 = 114 I. C. 273 = 12 A. I. Cr. R. 177; A. I. R. 1935 Nag. 125 (2) = 155 I. C. 258; A. I. R. 1934 Lah. 695 = 35 P. L. R. 738 = 1934 Cr. C. 1009.** When, however, an accused person is being examined by the Court under s. 342 it was never intended that he should be confronted with the statement which he had made to the police for the purpose of being discredited on account of any contradiction. **1935 A. L. J. 385.**

19. Confessional statements leading to discovery of facts [*P. 329, n. 20*].—Statements by accused persons relating to the discovery of ornaments worn by the deceased is admissible under s. 27, Evidence Act. **56 M. 231.**

SECTION 164.

I.—SCOPE AND OBJECT OF THE SECTION.

Notes.—1. Section applies to statements of approvers.—When an approver has accepted a tender of pardon, he stands in the same footing as any other witness and there is no legal bar to the examination of the approver under this section like any other witness. **A. I. R. 1933 Lah. 868 = 35 Cr. L. J. 111 = 146 I. C. 461 = 1933 Cr. C. 1113.** The Magistrate has power to administer an oath or solemn affirmation to him and the statement so recorded can form the subject of an alternative charge under the perjury sections of the Penal Code. **14 Lah. 507.**

II.—AT WHAT STAGE STATEMENTS, Etc., MAY BE RECORDED.

2. This section does not exclude confessions made before investigation and otherwise admissible [*P. 334, See n. 4*].—This section applies to statements recorded during investigation. **A. I. R. 1932 Lah. 403 = 33 P. L. R. 891 = 33 Cr. L. J. 97 = 135 I. C. 209 = 1932 Cr. C. 123.** But where the accused after the murder went straight to the Magistrate and confessed the crime and the Magistrate recorded it in the manner prescribed by this section though the investigation had not then begun, the Magistrate was entitled under s. 190 (1) (c) to record and act on the information furnished by the accused himself. S. 164 does not exclude confessions otherwise admissible. **55 M. 717.**

III.—ADMISSIBILITY IN EVIDENCE OF RECORD MADE UNDER THIS SECTION.

3. **Admissibility of statements made by witnesses** [*P.* 335, *n.* 6]—A statement by a witness recorded by a Magistrate under this section is not substantive evidence. 59 B. 120. But it is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate from which statement the witness resiled in the Sessions Court 60 C. 1239. A statement recorded under this section behind the back of the accused cannot be properly used as evidence against him. The only object in recording such statement is to obtain a hold over the witness. 6 Luck. 210. A confessional statement recorded under this section is not evidence in a judicial proceeding for the purpose of a conviction under s. 193, I. P. C., though the statement of an ordinary witness taken under this section is evidence in a judicial proceeding. (1933) M. W. N. 251.

4. **When confession duly recorded may be rejected** [*P.* 335, See *n.* 9]—The mere fact that the accused confessed in the hope of pardon will not justify its rejection as being improperly induced, in the absence of evidence to suggest that any police-officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon. A. I. R. 1933 Lah. 383 = 34 P. L. R. 704 = 143 I. C. 499 = 1933 Cr. C. 632 = 34 Cr. L. J. 593.

IV.—COMPETENCY OF MAGISTRATES TO RECORD CONFESSIONS, Etc.

5. **Confession may be recorded by a Magistrate subsequently conducting inquiry or holding trial** [*P.* 336, *n.* 14]—The recording Magistrate need not be a person other than a Magistrate who has begun an inquiry into the guilt of persons alleged to have been confederates of the confessing prisoner. A. I. R. 1932 Lah. 103 = 33 P. L. R. 891 = 135 I. C. 209 = 1932 Cr. C. 123 = 33 Cr. L. J. 97.

6. **Confession may be recorded at any time and place.**—There is no provision of law which forbids a Magistrate from recording a confession on a Sunday or any other holiday and at a place other than the Court-house. A. I. R. 1930 Lah. 171 = 31 Cr. L. J. 759 = 125 I. C. 49 = 1930 Cr. C. 179.

7. **Confessions recorded outside British India** [*P.* 336, *n.* 17]—The Criminal Procedure Code does not apply to Native States. If a confession is made outside British India, all that has to be seen is that there is nothing against the substantive law or natural law to vitiate it. Where the Magistrate recording such a confession deposed in the witness-box that he observed all the formalities, the confession though retracted is admissible in evidence. A. I. R. 1932 Lah. 367 = 137 I. C. 196 = 1932 Cr. C. 435 = 33 Cr. L. J. 480; 15 Lah. 491. Where every other formality under this section has been complied with and the Magistrate who recorded the confession was called at the trial and gave evidence, the mere fact that the Magistrate was a third class Magistrate in a Native State does not bar the confession from being admissible in evidence. S. 26 of the Evidence Act clearly makes such a confession admissible. A. I. R. 1933 A. 236 = 1933 Cr. C. 433 = 144 I. C. 157 = 34 Cr. L. J. 704. A Magistrate in a Native State is not a Magistrate for the purpose of s. 164 even though certain or all the provisions of the Criminal Procedure Code have been incorporated by the Native State in its own laws and regulations. A confession recorded by such a Magistrate is an extra-judicial confession and can be proved under the Evidence Act against the parties making them. A. I. R. 1934 Sind 103 = 35 Cr. L. J. 1323 = 151 I. C. 311 = 1934 Cr. C. 828.

V.—DUTIES AND POWERS OF MAGISTRATES IN RECORDING STATEMENTS AND CONFESSIONS.

8. **Duty of Magistrate before recording confessions or statements**—Notifications [*P.* 337, *n.* 19]—Under the Government Orders prescribing the procedure to be adopted for recording confessions, it is the business of the Magistrate to direct every effort to satisfy himself that a confession is really voluntarily and truly made and as to why it is made. A. I. R. 1931 A. 609 = 1931 A. L. J. 1000 = L. R. 12 A. (Cr.) 117 = 32 Cr. L. J. 1052 = 133 I. C. 593 = 1931 Cr. C. 961 = 16 A. I. Cr. R. 158. But such rules, salutary as they are, are intended for the guidance of Magistrates but they have not the effect of law and the mere omission to comply therewith in any particular respect is not *per se* sufficient to rule out the confession if there has been no breach of the provisions of the section. A. I. R. 1933 Oanh 259 = 10 O. W. N. 642 = 34 Cr. L. J. 833 = 144 I. C. 769 = 1933 Cr. C. 669.

9. **Voluntary character of confession should first be ascertained** [*P.* 337, *n.* 20]—It is the duty of the Sessions Judge or any other Magistrate before whom the confession may be produced, to examine it with a view to satisfy himself that it was really voluntarily and truly made and as to why it is made. He should not accept it as a matter of course. A. I. R. 1931 A. 609 = 1931 A. L. J. 1000 = L. R. 12 A. (Cr.) 117 = 16 A. I. Cr. R. 158 = 133 I. C. 593 = 32 Cr. L. J. 1052 = 1931 Cr. C. 961.

10. Magistrate not to cross-examine the deponent [*P. 338, n. 23*].—It is the duty of the Magistrate merely to record such confession or statement as the accused might desire to make. It is also part of his duty with great caution and exercising the greatest discretion to question the accused in order to eliminate any real ambiguity so as to make the statement intelligible. But he has no right whatever to cross-examine the accused or to endeavour to get particular statements out of him. *A. I. R. 1930 A. 746 = 1930 A. L. J. 1105 = L. R. 12 A. (Cr.) 1 = 32 Cr. L. J. 152 = 123 I. C. 593 = 1930 Cr. C. 1002 = 14 A. I. Cr. R. 497*. Where confessions of several accused are recorded, the Magistrate ought to see that one accused is not able to hear the statement made by another. *9 Luck. 546*.

11. Magistrate should record statement of accused refusing to make a confession.—It is not the function of the Magistrate to reduce to writing what the persons placed before him say only if they make statements which the police expect them to make and otherwise to make no note of anything which they say. He should also record what the accused were asked and what they stated when they refused to make a confession. *55 A. 91*.

VI.—CONFESSION SHOULD BE VOLUNTARY.

12. Fact and duration of police custody is an important element in determining the voluntary character of the confession [*P. 340, n. 33*].—It is most desirable that the accused should be sent to jail custody and removed from police influence before they are placed before Magistrates for the recording of their confessions. It is also very necessary in the interests, both of the accused and of the prosecution that after the confession is recorded, the accused should not be sent back to police custody and that at the time when the confession is recorded the accused should be assured that they need be under no fear of going back into the custody of the police. *9 Luck. 546*. Where the Magistrate handed over the accused to the investigating officer who was in attendance outside his room and recorded his confession after he had been with the police-officer for a few minutes, *held* that the procedure was not a proper one in that it reduced to a very great extent whatever value the confession otherwise had. *A. I. R. 1931 Lah. 403 = 132 I. C. 185 = 1931 Cr. C. 643 = 32 Cr. L. J. 813 = 16 A. I. Cr. R. 190*. In *25 B. 543* it was laid down that the Magistrate should inquire how long the accused had been in custody. This is doubtless a very salutary precaution but failure to do so does not invalidate or cast any doubt upon the genuineness and voluntary nature of the confession. *A. I. R. 1931 Lah. 763 = 133 I. C. 55 = 32 Cr. L. J. 935 = 1931 Cr. C. 1067 = 17 A. I. Cr. R. 41*.

VII.—FORMALITIES TO BE OBSERVED AND OMISSIONS THEREOF.

13. Provisions as to mode of recording confessions are mandatory [*P. 340, n. 37*].—Failure to question the accused as to his making the confession voluntarily, is a radical and fatal defect, which cannot be cured by s. 533. It is not enough for the Magistrate to conclude from observation that the confession was voluntarily made. *A. I. R. 1932 Lah. 204 = 33 P. L. R. 241 = 136 I. C. 19 = 33 Cr. L. J. 242 = 1932 Cr. C. 243 = 17 A. I. Cr. R. 423*. A confession where the Magistrate has not recorded the necessary preliminary question, is admissible in evidence, provided the omission has not injured the accused in his defence on the merits. The irregularity in not recording the questions can be cured under s. 533. But before the confession can be admitted under s. 533 and the irregularity cured, the statement must have been "duly made," but it is not necessary that it should have been duly recorded. The defect in recording a statement which has been duly made can be cured by calling further evidence to prove that it had been duly made. *56 A. 302 (F. B.)*; *A. I. R. 1930 Lah. 534 = 32 Cr. L. J. 290 = 123 I. C. 239 = 1930 Cr. C. 632*; *6 Luck. 335*. Section 533 can only cure a defect which was more or less formal in character, but a defect which was not merely one of form but was one of substance and which prejudicially affected the accused as to his defence on the merits cannot be cured by s. 533. *8 Luck. 513*.

14. Should the police be excluded when recording statements of witnesses [*P. 341, n. 38*].—Magistrates have power if they think it necessary to ensure the voluntary character of the witnesses' statement and have reason to apprehend that the police are exercising an influence over the witnesses which they ought not to do, to exclude the police, or in fact any others from the Court during the examination under s. 164. But they are not required to do so by law and the practice is likely to lead to the statements of witnesses being incomplete as only the police who have investigated the case know the information which the witnesses are able to give, and without their help, the Magistrate will not be able to elicit all that the witnesses are able to speak to. (1932) *M. W. N. 625*.

15. Confession must be "recorded" by the Magistrate.—The section enacts that the Magistrate must "record" any statement or confession. Where the accused while under police custody wrote out his confession and when brought before the Magistrate, handed it over to him after answering the usual questions, the procedure did not amount to "recording" a confession. Recording means writing down and not merely filing the confession. A confession not written down by the Magistrate himself is inadmissible in evidence. 55 A. 426.

16. Recording confession in different language [P. 341, n. 39]—Recording confession in English and not in the language in which it was made, cannot be considered to be material if the evidence of the Magistrate shows that the confession was made voluntarily and correctly recorded. A. I. R. 1932 Lah. 73 = 32 P. L. R. 792 = 133 I. C. 545 = 32 Cr. L. J. 1036 = 1932 Cr. C. 73 = 17 A. I. Cr. R. 102.

17. Omission by Magistrate to sign or to take the signature of person confessing [P. 342, n. 45]—If there is evidence to show that the confession was voluntarily and correctly recorded, omission to take the signature or thumb-impression of the accused is not material. A. I. R. 1932 Lah. 73 = 32 P. L. R. 792 = 133 I. C. 545 = 32 Cr. L. J. 1036 = 1932 Cr. C. 73 = 17 A. I. Cr. R. 102. A confession which bore neither the signature of the Magistrate nor of the accused would be not one in strict accordance with the provisions of s. 364. But the fact that it has been duly made by the accused can be proved by further evidence under s. 533 and except perhaps in cases not easily conceivable, the accused is not likely to be injured in his defence on the merits on account of such omission. 56 A. 302 (F. B.)

18. Irregularity in appending certificate [P. 342, n. 46]—*Appending certificate in old form*—Where the Magistrate did not append to his records, certificates that he had explained to the accused that their confessions might be used as evidence against them, the certificates appended being in the old form prescribed before the amendment in 1923, it was held that the irregularity did not injure the appellants and was duly cured by the evidence of the Magistrate himself who, as a witness, testified that he had as a fact made the necessary explanation before recording the statements. A. I. R. 1931 Lah. 196 = 130 I. C. 641 = 1931 Cr. C. 316 = 32 Cr. L. J. 579 = 16 A. I. Cr. R. 213; A. I. R. 1933 Lah. 311 (2) = 34 P. L. R. 702 = 34 Cr. L. J. 712 = 144 I. C. 296 = 1933 Cr. C. 545; A. I. R. 1934 Lah. 18 = 1934 Cr. C. 36 = 151 I. C. 745 = 35 Cr. L. J. 1332.

Memorandum need not be in Magistrate's handwriting.—There is no authority for the view that the memorandum provided by sub-sec. (3) must be in the handwriting of the Magistrate himself. It is a sufficient compliance with the law if the memorandum is signed by the Magistrate. 57 B. 336 (F. B.) *over-ruling* 56 B. 542, where a confession was held inadmissible by reason of the fact that the memorandum was written out by the clerk and signed by the Magistrate, even though the Magistrate gave evidence that he did warn the accused. See also A. I. R. 1933 Sind 166 = 34 Cr. L. J. 808 = 144 I. C. 664 = 1933 Cr. C. 530.

Memorandum need not be at the foot of the original confession.—Once the memorandum has been made in accordance with sub-sec. (3) the mere fact that it was attached to the English memorandum of the original vernacular confession, the English memorandum also forming part of the record, is a sufficient compliance with the law. 57 B. 336 (F. B.)

Memorandum need not be at the beginning of the confession.—The section distinctly lays down that all that is necessary is that the Magistrate shall append a memorandum containing *inter alia* a clause to the effect that he has explained to the accused that he is not bound to make a confession. The section does not require that there should be any note at the beginning of the confession reciting the fact that the explanation has been made. 57 B. 336 (F. B.)

19. Recording confession in narrative form [P. 342, n. 48]—Section 364 lays down that every question asked and answer given must be recorded in full, but it does not compel a Magistrate proceeding under this section to put a series of questions. Such procedure is ordinarily to be deprecated. The confessing person should be left to narrate his story as a whole, without any unnecessary interference and allowed to give all the details that he remembers and wishes to describe. If this is not done, the record of the confession will lose much of its value. A. I. R. 1932 Lah. 180 = 33 P. L. R. 16 = 1932 Cr. C. 179 = 137 I. C. 95 = 33 Cr. L. J. 414 = 18 A. I. Cr. R. 110.

20. It is not necessary that the Magistrate should record the questions and answers put with a view to satisfying himself as to voluntary nature of confession.—The section lays down that the Magistrate

must satisfy himself and provided he does and the High Court or other Appellate Court is satisfied that he did, it is not necessary that he should record all the questions and answers. The later provision of the Code directing that such questions and answers shall be recorded in full applies only to the body of the confession. A. I. R. 1931 Lah. 763 = 133 I. C. 55 = 32 Cr. L. J. 985 = 1931 Cr. C. 1067 = 17 A. I. Cr. R. 41; A. I. R. 1932 Lah. 204 = 53 P. L. R. 241 = 136 I. C. 19 = 1932 Cr. C. 248 = 33 Cr. L. J. 242 = 17 A. I. Cr. R. 428. But in 54 A. 350 it was held that it was the imperative duty of the Magistrate to record those questions and answers by means of which he has satisfied himself that the confession is in fact voluntary, so as to supply the data or materials for the Sessions Court or the High Court to form an estimate of the voluntary nature of the confession without merely accepting the *ipsi dixit* of the Magistrate. See also 6 Luck. 335. It is desirable that every question put and the answer given by the confessing person should be recorded by the Magistrate. A. I. R. 1933 Oudh 313 = 10 O. W. N. 461 = 1933 Cr. C. 696 = 146 I. C. 449 = 35 Cr. L. J. 7; A. I. R. 1933 Oudh 299 = 10 O. W. N. 642 = 34 Cr. L. J. 838 = 144 I. C. 769 = 1933 Cr. C. 669.

21. Even if accused is not warned, statement is admissible under s. 29, Evidence Act.—This section does not pretend to over-ride s. 29, Evidence Act. The position therefore would seem to be that though s. 164 of the one Act makes it imperative that the accused should be cautioned, s. 29 of the other Act says that his statement is not inadmissible in evidence merely because the prescribed caution is not administered. And it is to the latter Act that we have to look when there is a question as to the admissibility of a particular piece of evidence. 55 M. 711; (1932) M. W. N. 714; A. I. R. 1933 Oudh 404 = 10 O. W. N. 937 = 35 Cr. L. J. 192 = 146 I. C. 905 = 1933 Cr. C. 1277; A. I. R. 1933 Sind 166 = 34 Cr. L. J. 808 = 144 I. C. 664 = 1933 Cr. C. 530. So far as the mere admissibility of the confession is concerned the mere fact that the accused had not been warned that he was not bound to make such a confession would not be a fatal defect. 58 A. 302 (F. B.)

VIII—RETRACTED CONFESSIONS.

22. Effect of confession subsequently retracted [P. 343, n. 53].—There is no absolute rule of law that a retracted confession cannot be accepted as evidence of the prisoner's guilt without independent corroborative evidence; but it has been held in various cases that it is a rule of prudence which requires that a retracted confession which is generally always open to suspicion shall not be acted upon to the prejudice of the accused unless it is corroborated by reliable and independent evidence to a material extent and also in material particulars. 56 B. 542; A. I. R. 1933 C. 747 = 57 C. L. J. 213 = 34 Cr. L. J. 1222 = 146 I. C. 188 = 1933 Cr. C. 1249 (S. B.); A. I. R. 1930 C. 141 = 50 C. L. J. 513 = 31 Cr. L. J. 667 = 124 I. C. 436 = 1930 Cr. C. 141; A. I. R. 1934 Lah. 715 = 36 P. L. R. 2 = 35 Cr. L. J. 1390 = 151 I. C. 716 = 1934 Cr. C. 1025; A. I. R. 1934 Pat. 586 = 15 P. L. T. 711 = 36 Cr. L. J. 12 = 152 I. C. 275 = 1934 Cr. C. 1243; A. I. R. 1933 Sind 313 (2) = 35 Cr. L. J. 17 = 146 I. C. 180 = 1933 Cr. C. 1043; A. I. R. 1932 Sind 201 = 26 S. L. R. 302 = 1932 Cr. C. 810 = 141 I. C. 392. A subsequent retraction does not cancel out the confession, but it puts the Court on inquiry as to its value, its voluntary character and the probability of its being true. 35 Bom. L. R. 371 = A. I. R. 1933 B. 230 = 34 Cr. L. J. 896 = 145 I. C. 133 = 1933 Cr. C. 653. Where the Court is satisfied that the confession was true and voluntarily made, it can act upon it though it is retracted subsequently. A. I. R. 1932 Oudh 115 = 9 O. W. N. 96 = 1932 Cr. C. 188 = 33 Cr. L. J. 812 = 139 I. C. 736; A. I. R. 1932 Oudh 321 = 9 O. W. N. 327 = 137 I. C. 665 = 33 Cr. L. J. 502 = 18 A. I. Cr. R. 233 = 1932 Cr. C. 872; A. I. R. 1933 Oudh 263 = 10 O. W. N. 405 = 34 Cr. L. J. 595 = 143 I. C. 555 = 1933 Cr. C. 615. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them false, the confession may be acted upon without any further corroboration. 57 M. L. J. 681 = 30 M. L. W. 642 = (1929) M. W. N. 901 = A. I. R. 1929 M. 837 = 2 M. Cr. C. 298 = 1929 Cr. C. 485. Every case must be decided upon its own circumstances. A. I. R. 1933 Lah. 383 = 143 I. C. 499 = 34 P. L. R. 704 = 34 Cr. L. J. 598 = 1933 Cr. C. 632. A confession which was resiled from, before the Magistrate completed appending the certificate, was no confession at all. 11 Lah. 106.

23. Value of retracted confession against co-accused [P. 344, n. 57].—The confession of a co-accused stands even on a lower footing than that of the evidence of an accomplice, as it is not a statement on oath and cannot be tested by cross-examination and it cannot therefore be accepted without material corroboration connecting the accused with the crime. A. I. R. 1933 Lah. 956 = 1933 Cr. C. 1411 = 35 P. L. R. 115 = 146 I. C. 1081; A. I. R. 1932 Lah. 298 = 136 I. C. 27 = 33 Cr. L. J. 251 = 1932 Cr. C. 378 = 33 P. L. R. 602; A. I. R. 1933 Lah. 230 = 35 Cr. L. J. 1180 = 150 I. C. 1056; 11 Lah. 106; 55 A. 91; 7 Luck. 511; A. I. R. 1933 Rang. 134 = 34 Cr. L. J. 835 = 144 I. C. 829 = 1933 Cr. C. 720.

X.—MISCELLANEOUS.

24. Oral confessions [*P.* 346, *n.* 66 and *P.* 335, *n.* 8]—An oral confession before a Magistrate is admissible under s. 26, Evidence Act. *A. I. R.* 1933 *Lah.* 956 = 35 *P. L. R.* 115 = 146 *I. C.* 1-61 = 1933 *Cr. C.* 1411; *A. I. R.* 1930 *Lah.* 534 = 32 *Cr. L. J.* 293 = 129 *I. C.* 239 = 1933 *Cr. C.* 632; *A. I. R.* 1933 *Oudh* 432 = 10 *O. W. N.* 923 = 1933 *Cr. C.* 1317 = 147 *I. C.* 113. If a confession is formally recorded under the provisions of the Code by a Magistrate, the provisions of the Code must be followed. If a confession is not recorded even though the Magistrate is empowered to record it, then the general law as enacted in the Evidence Act applies and an oral confession by an accused person not being open to exception under ss. 24, 25 or 26, Evidence Act is a relevant fact as an admission by him and can be proved under s. 21, Evidence Act. A written memorandum of the Magistrate is however not admissible although the Magistrate can refresh his memory by referring to it under s. 159, Evidence Act. 14 *Lah.* 290 (*F. B.*); *A. I. R.* 1933 *Lah.* 513 (2) = 34 *P. L. R.* 896 = 34 *Cr. L. J.* 1164 = 145 *I. C.* 1029 = 1933 *Cr. C.* 772. Notes made by the Magistrate while the accused pointed out several places, is not admissible. *A. I. R.* 1929 *Lah.* 794 = 121 *I. C.* 497 = 31 *Cr. L. J.* 269 = 1929 *Cr. C.* 426. S. 164, *Cr. P. C.*, does not in terms make it obligatory on a Magistrate to record a confession. The language leaves it optional to the Magistrate to record the confession or not as he thinks fit. He is not bound to record it even if he be clearly of opinion that the person is willing to make a perfectly voluntary confession. The mere reference to s. 91, Evidence Act in s. 533 cannot be taken to imply that a Magistrate hearing an oral confession is bound to record the confession in the manner laid down in s. 164. The language of that section is "may record" and not "shall record." An unrecorded confession is therefore relevant and can be proved by the Magistrate's oral testimony. The weight to be attached to such oral testimony is a different matter. 56 *A.* 720. But merely because a confession is not recorded, it does not follow that it is unnecessary to ensure as provided in s. 164 that it is voluntarily made. Such an oral confession is not admissible in evidence unless the Court is satisfied about its voluntary nature. The mere presence of the Magistrate does not make it admissible. (1935) *M. W. N.* 82.

25. Statements made under this section are public documents.—After recording the confession it should be forwarded to the Magistrate by whom the case is to be inquired into or tried. It is not proper for the Magistrate recording the confession to make it over to the police-officers. *A. I. R.* 1931 *Lah.* 403 = 132 *I. C.* 185 = 1931 *Cr. C.* 648 = 32 *Cr. L. J.* 818 = 16 *A. I. Cr. R.* 190. The provision that the statements shall be sent to the Magistrate by whom the case is to be tried, is imperative and must be complied with by the Magistrate recording the statement. When the statements have been received by the Magistrate by whom the case is to be tried, he must place them on the judicial record. There is no provision that these statements are confidential documents, nor is there any prohibition against their being inspected by the accused or copies thereof taken by them. To take the position that statements recorded under this section cannot be seen by the accused until after the witness concerned has been examined in chief, is wholly untenable. *A. I. R.* 1931 *Lah.* 59 = 129 *I. C.* 193 = 32 *Cr. L. J.* 253 = 1931 *Cr. C.* 139. An accused is undoubtedly entitled to inspect statements of prosecution witnesses recorded under this section. Such statements can be used by the prosecution for the purpose of corroborating the witnesses. They can likewise be used by the defence for the purpose of contradicting such witnesses. Even if the accused were not entitled as of right to inspect the statements, the Magistrate should exercise his discretion in favour of the accused in such cases for the ends of justice. *A. I. R.* 1932 *A.* 327 = 1932 *Cr. C.* 306 = *L. R.* 13 *A. (Cr.)* 100 = 18 *A. I. Cr. R.* 98 = 139 *I. C.* 330 = 33 *Cr. L. J.* 752.

SECTION 165.

Note.—Reasons for search to be recorded [*P.* 348, *n.* 8]—The police-officer is bound to record in writing the grounds of his belief as to the necessity for searching the house and specifying clearly the article or articles for which the search is to be made. 9 *Luck.* 1. Where a police-officer without any proper reason failed to comply with the requirements of sub-section (1) it is difficult to hold that he was acting in good faith within the meaning of s. 52, *I. P. C.* and the accused were justified in pushing him back in order to prevent a search which was not strictly in accordance with law. 10 *Pat.* 821.

SECTION 167.

Notes.—1. Remand to be granted in cases of real necessity [*P.* 353, *n.* 8]—A remand to police custody ought not to be granted by a Magistrate without satisfying himself as to its necessity and the period of remand ought also to be restricted to the necessities of the case. 12 *Lah.* 435; *A. I. R.* 1931 *Lah.* 200 = 31 *P. L. R.* 693 = 129 *I. C.* 767 = 1931 *Cr. C.* 320 = 32 *Cr. L. J.* 464 = 16 *A. I. Cr. R.* 94.

2. Provisions of the section to be strictly complied with [P. 353, See *n.* 9].—The law views with disfavour detention in the custody of the police and in the case of an accused person such detention can be allowed only in special cases and for reasons to be stated in writing and not as a matter of course whenever it may be asked for by an investigating officer. These provisions of the law are most useful and necessary and they should be strictly complied with by the Subordinate Courts. 12 Lah. 635; A. I. R. 1932 Oudh 11 = 8 O. W. N. 1240 = 16 A. I. Cr. R. 441 = 1932 Cr. C. 43 = 33 Cr. L. J. 237 = 136 I. C. 321; 8 Luck. 518.

3. Accused entitled to legal assistance in remand proceedings.—However serious a crime a person may be accused of, it is of paramount importance that counsel should be allowed to see the accused and take his instructions without there being any police-officer within ear-shot. To deny such a right to the accused will be to infringe two elementary but cardinal principles of British criminal Jurisprudence, *viz.*, that an accused person is entitled to be considered innocent until he is actually found to be guilty and secondly that all communications between an accused person (or indeed any litigant) and his legal advisers are privileged and confidential. 62 C. 334. The object of requiring an accused person to be produced before a Magistrate for purposes of remand under this section is obviously to enable the accused to make any representation he may wish to make in the matter. It is easy to see that legal assistance may be frequently very useful on such an occasion. 12 Lah. 435. In all cases where remands are granted, it is the duty of the Magistrate to inform the accused that he is a Magistrate, that a remand is applied for and to ask the accused how long he has been in police custody and whether he has any objection to offer to the remand. If the accused wishes to have counsel to represent him, it is the duty of the Magistrate to allow time for counsel to appear and argue the matter before him granting a temporary remand for the purpose. A. I. R. 1935 Lah. 230 = 35 Cr. L. J. 1189 = 150 I. C. 1056. The grant of a remand is a judicial function and the proceedings theretore fall within s. 340 which gives the accused the right to be defended by a pleader. 12 Lah. 16; 12 Lah. 211.

4. Who should grant remand.—Though under this section it is not necessary that the Magistrate granting a remand should be the Magistrate having jurisdiction to try the case, it is desirable that the Magistrate in charge of the *ilaga* should be approached for purposes of a remand. In such a case the Magistrate will have a greater sense of his responsibility, will be able to keep a close watch over the investigation and will be in a better position to judge the necessity of fresh remands. The accused person will also then not be left in doubt as to when and where he will be produced for purposes of a fresh remand. 12 Lah. 435.

SECTION 170.

Amendment.—Sub-section (4) was repealed by the Code of Criminal Procedure (Amendment) Act, 1926 (Act II of 1926).

SECTION 172.

Notes.—1. Police diaries not evidence [P. 360, *n.* 8].—The subject-matter of Police diaries would ordinarily be privileged under s. 125, Evidence Act. Ordinarily the work done by a police-officer and the report of that work in the investigation of a case would not be relevant except as provided by s. 162. S. 172 no doubt confers an absolute right on the Court to inspect all police diaries in connection with the investigation of an offence which is under inquiry or trial before it. But this use is permitted to the Court and the Court alone. The Court cannot delegate its duties in this matter to the counsel for the defence. If the Court considers that certain sources of inquiry are revealed by the diaries or that the police-officer should disclose the further steps taken by him, or if it becomes necessary to contradict the police-officer, the Court may use the diary for these purposes and till then the defence are not entitled to inspect the diaries. A. I. R. 1933 Lah. 498 = 34 P. L. R. 541 = 34 Cr. L. J. 484 = 142 I. C. 584 = 1933 Cr. C. 758. The Court may, on finding some fact noted in the diary, take advantage of this in order to put some necessary question to a witness in the box so as to elicit in evidence the fact which has been disclosed by the diary. The facts found in the diary are not to be used unless they are properly brought on record through the evidence of a witness. A. I. R. 1933 Pat. 440 = 14 P. L. T. 396 = 1933 Cr. C. 974 = 145 I. C. 426 = 34 Cr. L. J. 948.

2. Use of Police diary for contradicting witnesses.—Entries of statements in the diary are notoriously very condensed and the omission of some detail in the note of a statement is not always a sure indication that such detail was absent from the statement; and certainly a Court should never use such an absence as a contradiction without taking evidence to prove that no such thing was stated. A. I. R. 1933 Pat. 440 = 14 P. L. T. 396 = 1933 Cr. C. 974 = 145 I. C. 426 = 34 Cr. L. J. 948.

3. Court may refer to Police diary even after verdict.—Under this section the Court may send for the diaries and use them not as evidence in the case but to aid it in such inquiry or trial. If the judge could refer to them before the verdict, he could obviously refer to them after the verdict, as the trial is not finished with the verdict of the jury, as the Judge has still to decide whether he will accept it or refer the case. **56 C. 150.**

SECTION 173.

Notes.—1. Order to strike off case is not judicial [*P. 362, n. 3*].—A Magistrate's order directing a case reported to him by the police under this section, to be struck off, is not a judicial order. Such orders are purely administrative, or ministerial and the principle of *autrefois* acquit cannot possibly apply to them. A Magistrate has therefore power to reopen a case by calling for a charge-sheet. **12 Pat. 234.**

2. Report in the form prescribed [*P. 363, n. 6*].—There is no provision in the Code for a charge-sheet. Charge-sheet is a form provided under departmental rules of the Government presumably under sub-sec. (1) (a). The Government have prescribed two forms. One is called a "charge-sheet" to be used when the accused is sent up for trial and the other is called "final report" which is used when the accused is not sent up for trial. **A. I. R. 1932 Pat. 72 = 12 P. L. T. 937 = 1932 Cr. C. 136 = 136 I. C. 342 = 33 Cr. L. J. 349.** A Magistrate cannot take cognizance under s. 190 (1) (b) on a police report which does not set forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. **A. I. R. 1930 B. 372 = 32 Bom. L. R. 782 = 31 Cr. L. J. 1142 = 127 I. C. 110 = 1930 Cr. C. 891.** The section does not require that an abstract of the evidence to be given by each of the witnesses mentioned, should be entered in the report or charge-sheet. **A. I. R. 1930 M. 191 = (1929) M. W. N. 504 = 2 M. Cr. C. 190 = 31 Cr. L. J. 387 = 122 I. C. 341 = 1930 Cr. C. 191 = 14 A. I. Cr. R. 120.**

3. Section applies to referred charge-sheet.—Although this section which deals with the final report of the police does not appear to contemplate anything but a report which leads to trial if the Magistrate approves of it, nevertheless as the police must send a report after investigation in every case, there is no other section under which a referred charge-sheet after investigation can be brought. **(1932) M. W. N. 543 = 36 M. L. W. 733 = 63 M. L. J. 679 = A. I. R. 1932 M. 673 = 5 M. Cr. C. 220 = 139 I. C. 530 = 33 Cr. L. J. 785 = 1932 Cr. C. 831.**

4. District Magistrate cannot order further investigation after the police have sent up the case for trial under this section.—Where the police sent up the accused for trial with a report under this section and after the prosecution evidence had been recorded, the Magistrate framed a charge against the accused, it was not open to the District Magistrate on the affidavits filed by certain persons that the accused was innocent, to direct the police to make further investigation into the case. If the investigation is completed and a report is made under this section, the police-officer has no power to resume the investigation. **A. I. R. 1932 Lah. 611 = 33 P. L. R. 793 = 140 I. C. 25 = 1932 Cr. C. 917 = 33 Cr. L. J. 912.**

SECTION 174.

Note.—Accused entitled to use inquest report in cross examining prosecution witnesses.—The accused is entitled for the purposes of his defence to get a copy of the inquest report and to cross-examine with reference to the report, the prosecution witnesses who had also given evidence at the inquest. **A. I. R. 1933 C. 861 = 37 C. W. N. 732 = 147 I. C. 1007 = 1933 Cr. C. 1478.**

CHAPTER XV.

OF THE JURISDICTION OF CRIMINAL COURTS IN INQUIRIES AND TRIALS.

Note.—Jurisdiction of British Indian Courts when offences committed outside British India [*P. 407, n. 3*].—An offence committed outside British India by a foreigner residing in a foreign country is not an offence punishable under the Indian Penal Code. There is therefore no scope for calling in the aid of the provisions of the Criminal Procedure Code. All the sections of this chapter are to be read subject to the general rule that an act committed on land outside British Territory by a foreigner not being a servant of the King, is not an offence triable by the British Courts and that illustration (d) to s. 179 must be read subject to this general rule. **A. I. R. 1933 Sind 333 = 27 S. L. R. 392 = 1933 Cr. C. 1130.**

SECTION 177.

Note.—Jurisdiction in cases of Contempt of High Court [P. 410, n. 5]—As a Court of Record the High Court has jurisdiction in all matters of Contempt of Court arising in the Presidency. Contempt of Court is not an offence within the ambit of the Penal Code, but nevertheless it conforms to the ordinary rule that the jurisdiction of the Court is determined by the place where the offence is committed and not by the place where the offender may happen to reside. 57 M. 831.

SECTION 179.

Notes.—1. When the offence is complete where it has been initiated, this section has no application [P. 412, n. 1]—The offence of public nuisance punishable under s. 290, I. P. C. consists of doing any act or an illegal omission which causes any injury, danger or annoyance to the public in the vicinity or which must necessarily cause such injury, etc. The offence is complete when an act of this nature is committed or when there has been an illegal omission of this kind. Where a person was charged in British Territory with committing public nuisance by arranging a procession with music and fireworks in the adjoining French Territory and thereby disturbing the sleep of people in the vicinity of the French Territory, *held*, that apart from the question of want of certificate of the Political Agent under s. 188, s. 179 had no application as the offence was completed in French Territory itself. 63 M. L. J. 211 = (1934) M. W. N. 1316 = 41 M. L. W. 82 = A. I. R. 1935 M. 189 = 154 I. C. 146 = 1935 Cr. C. 227.

2. Must the consequence be part and parcel of the offence? [P. 412, n. 2]—*See* note 1 to s. 181.

3. Offence of cheating—S. 417—420, I. P. C. [P. 414, n. 9]—Where the accused drew a cheque at M. on a Bank at F., which was dishonoured on presentation at F., *held* that not only was the Court at M. entitled to inquire into the offence of cheating but that the Court at F. had also jurisdiction to inquire into the said offence, for though the act of deception took place at M. its consequences arose in F. where the complainant who was deceived realised that he had been given a bogus cheque and cheated out of his money. 8 Luck. 381. The complainant on behalf of his firm at M. entered into a contract with the accused at D. for the purchase of certain goods on behalf of the accused. Under the instructions of the complainant, his firm at M. purchased the goods. The accused gave a cheque at D. on a Bank at D. which was subsequently dishonoured as he had no account with that Bank. *Held* that it was the complainant's firm at M. which was deceived into purchasing the goods in consequence of the misrepresentation made by the accused through the complainant and that the consequences resulting from the deception practised by the accused at D. ensued at M. S. 179 was clearly applicable to the case and the Court at M. had jurisdiction. A. I. R. 1934 A. 846 = 4 A. W. R. 246 = 1935 A. L. R. 169 = 154 I. C. 315 = 1934 Cr. C. 1033. Where the accused posted by V. P. a parcel containing a paper said to be the first lesson in mesmerism and the addressees received the parcels after paying the value, the offence of cheating was completed by reason of the delivery of the parcel at the Post Office, the posting being an essential part of the offence, and the Court having jurisdiction over the place of posting, could try the offence. 32 Bom. L. R. 785 = A. I. R. 1930 B. 353 = 31 Cr. L. J. 1155 = 127 I. C. 177 = 15 A. I. Cr. R. 63.

4. Conspiracies [P. 414, n. 10]—The gist of the offence of conspiracy lies not in doing the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do any of the acts nor in inducing others to do them but in the forming of the scheme or agreement between the parties. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court. A. I. R. 1933 Sind 333 = 27 S. L. R. 392 = 1933 Cr. C. 1130.

5. Offences under other Acts—Provincial Insolvency Act.—Where the accused executed a mortgage at B. with intent to defraud the creditors at Y. and thereby committed an offence under s. 69 (c) (2), Provincial Insolvency Act, whether the offence is regarded as being complete at B. by the mere execution of the Mortgage Deed, with intent to defraud the creditors at Y., or by the consequence, namely, the diminution of the sum to be divided among his creditors actually ensuing from it, the Court at Y. would be a proper tribunal to try the offence since the diminution of the assets was either a consequence or part and parcel of the offence. A. I. R. 1933 Nag. 33 = 34 Cr. L. J. 1033 = 145 I. C. 550 = 1933 Cr. C. 75.

SECTION 180.

Note.—Venue for the trial of the offence of concealing kidnapped person—S. 368, I. P. C.—The offence under s. 368, I. P. C. could be tried either by the Court having jurisdiction over the place where the kidnapping took place or by the Court at the place where the person was concealed or kept in confinement. Illustration (c) makes this clear. A. I. R. 1933 Oudh 45 = 9 O. W. N. 1181 = 34 Cr. L. J. 220 = 141 I. C. 741 = 1933 Cr. C. 88.

SECTION 181.

Notes.—1. Criminal Breach of Trust and Criminal Misappropriation, ss. 403-409, I. P. C. [P. 418, n. 7].—

- (i) *Is section 179 applicable?*
- (ii) *Is loss a necessary consequence?*
- (iii) *Have the Courts where the complainant suffers loss occasioned by the offence resides, jurisdiction by reason of the consequent loss.*

Allahabad.—Section 179 contemplates cases where the act done and the consequence ensuing therefrom together constitute the offence. If the offence is complete in itself by reason of the act having been done and the consequence is a mere result of it which was not essential for the completion of the offence, then s. 179 would not be applicable. In an offence under s. 403, I. P. C., the Court at the place where the loss ensues to the complainant is therefore not the proper forum for instituting proceedings. 56 A. 1047 (F. B.) *dissenting* from 35 A. 29, 52 A. 894 and A. I. R. 1932 A. 367 = 1932 A. L. J. 269 = L. R. 13 A. (Cr.) 60 = 33 Cr. L. J. 711 = 139 I. C. 159 = 17 A. I. Cr. R. 333. The complainant, a resident of Jhansi District, opened a branch shop at Calcutta and placed it in charge of the accused. Though the accused was to render an annual statement of account at Jhansi, it was held that the Court at Jhansi had no jurisdiction to entertain a complaint of criminal breach of trust against the accused. The criterion of the residence of the person who suffered wrongful loss was not the correct criterion. A. I. R. 1934 A. 127 = 1934 A. L. R. 600 = 3 A. W. R. 494 = 35 Cr. L. J. 934 = 149 I. C. 402 = 1934 Cr. C. 185.

Bombay.—Section 179 has no application to an offence under s. 408, I. P. C. It may be that as a result of or consequent upon a criminal breach of trust or any other offence, loss may result to some individual but unless the "consequence which has ensued" is an essential ingredient of the offence, the loss is not a consequence. The mere failure to account at another place makes no difference. 55 B. 59 (F. B.) *over-ruling* 46 B. 641. It was held in A. I. R. 1929 Sind 30 = 22 S. L. R. 404 = 30 Cr. L. J. 249 = 114 I. C. 99 that the word "consequence" should be given its ordinary meaning and it should not be restricted to mean a consequence which is a necessary ingredient of the offence. This decision followed 46 B. 641, which, as stated above, was over-ruled by 55 B. 59 (F. B.)

Calcutta.—If there is evidence apart from the evidence of non-accounting to show where the misappropriation was committed, the venue must be laid either in that place or in the place where the property was received or retained. If there is no evidence to show where the misappropriation was committed other than the fact of non-accounting, then the venue may be laid in the place where the accused failed to account, because that is where the offence was committed within the meaning of s. 181 (2). 59 C. 92; A. I. R. 1934 C. 392 = 35 Cr. L. J. 734 = 148 I. C. 736 = 1934 Cr. C. 533. Where the complaint itself showed that the accused had cashed the hundies and realised moneys at B. and did not credit them in the books of the complainant at B. and thereby misappropriated the moneys realised, it was held that the non-accounting at C. the complainant's principal place of business, was not the only evidence to establish the alleged misappropriation and hence the venue for the trial was not at C. but at B. A. I. R. 1931 C. 532 = 1931 Cr. C. 634 = 32 Cr. L. J. 1249 = 134 I. C. 929. The mere failure to account at C. is not the same thing as dishonestly using the money at C. or dishonestly disposing the money at C. 35 C. W. N. 320 = 1931 Cr. C. 673 = 133 I. C. 703 = 32 Cr. L. J. 1042 = A. I. R. 1931 C. 521.

Lahore.—It is settled law that s. 181 (2) over-rides and is not qualified by s. 179. A trial on a charge of criminal breach of trust can only be tried by a Court within the limits of whose jurisdiction any part of the property concerned was received or retained by the accused person or the offence was committed. The existence of a contractual or other obligation to deliver property at a certain place, or the fact that loss is caused at that place will not empower the Court having jurisdiction there to try a person who has misappropriated elsewhere. A. I. R. 1933 Lah. 559 = 34 Cr. L. J. 902 = 144 I. C. 991 = 1933 Cr. C. 817.

Rangoon.—Section 181 (2) is a special provision dealing with the matter of venue of the trial in cases of criminal breach of trust and when there is a special provision of the law dealing with a particular matter, it will require strong words to show that a provision of more general application was intended to deal with the matter. The decision of the venue of trial for criminal breach of trust must be decided under s. 181 (2). 9 Rang. 333.

Oudh.—Where the accused withdrew money from the treasury at S, but dishonestly misappropriated the amount or converted it to his own use at M the Court at M. has jurisdiction to try the offence under s. 403, I. P. C. A. I. R. 1935 Oudh 4 = 11 O. W. N. 1392 = 1934 O. L. R. 859 = 36 Cr. L. J. 112 = 152 I. C. 463 = 1935 Cr. C. 9.

2. *Venue of trial for criminal breach of trust when several items constituting one offence under s. 222 (2) was received at different places.*—When a person is charged with criminal breach of trust in respect of a gross sum consisting of several items, some of which were received by him in villages situate outside the jurisdiction of the Magistrate to whom the complaint is made, it is open to the complainant and the Magistrate to consolidate all the items and to frame a charge under s. 222 (2) in respect of only one offence. The combined effect of ss. 222 (2) and 181 (2) is that the accused can be tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received by him. 1932 A. L. J. 160 = A. I. R. 1932 A. 25 = L. R. 12 A. (Cr.) 157 = 33 Cr. L. J. 127 = 135 I. C. 228 = 1932 Cr. C. 35 = 16 A. I. Cr. R. 464.

SECTION 182.

Note.—*Scope of section—Conflict of areas* [P. 421, n. 4]—Where it was proved that Cawnpore was one of the centres of the conspiracy and that one of the accused who was arrested at Cawnpore wrote letters to other accused from Cawnpore and received letters addressed to him at Cawnpore, the Sessions Court at Cawnpore had jurisdiction to try all the accused. A. I. R. 1933 A. 493 = 1933 Cr. C. 833. The offence of kidnapping from lawful guardianship is not a continuing offence. The offence is completed as soon as the minor is removed out of the custody of the guardian. But abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another. An offence under s. 366-A, I. P. C., is a continuing offence, and may be tried by a Court having jurisdiction over any of the local areas where the offence continued to be committed. By virtue of s. 180 of the Code, abetment of a continuing offence may be tried by the Court within the local limits of whose jurisdiction the offence abetted was committed. 53 A. 140.

SECTION 188.

Amendment.—In the second proviso for the words and figures “the Foreign Jurisdiction and Extradition Act, 1879” the words and figures “the Indian Extradition Act, 1903” shall be substituted—Act X of 1927.

Notes.—1. *Definition*—“Political Agent” [P. 426, n. 2]—A British Vice-Consul in any part of a Foreign territory or Colony under the suzerainty of a foreign independent state is not an officer appointed by the British Indian Government, and does not come within the meaning of a Political Agent as used in this section. A. I. R. 1924 Sind 96 = 28 S. L. R. 27 = 1934 Cr. C. 821 = 153 I. C. 60. His Britannic Majesty's Minister at Kabul is not a Political Agent within the definition to be found in the General Clauses Act, 1897. 16 Lah. 73.

2. *Does this section restrict the scope of s. 179?* [P. 427, n. 6 and p. 425, Note]—Section 188 overrides section 179 in any case in which section 188 is applicable, that is to say, where the question is as to a native Indian subject committing an offence without and beyond the limits of British India or a British subject committing an offence in the territories of a Native Prince and so forth. 59 C. 1065; (1935) M. W. N. 325 (2) = A. I. R. 1935 M. 326 = 41 M. L. W. 352 = 68 M. L. J. 415; 54 B. 171. A person who is alleged to have committed public nuisance punishable under s. 290, I. P. C. by arranging for a procession with music and fireworks in French territory and thereby caused annoyance, etc., by disturbing the sleep of the inhabitants in the adjacent British territory, cannot be tried in British India. The offence was complete in French territory and s. 179 had no application. Even if it did apply, the want of the certificate of the Political Agent or the Local Government as the case may be, was a bar to such trial. 63 M. L. J. 211 = (1934) M. W. N. 1316 = 41 M. L. W. 82 = A. I. R. 1935 M. 139 = 154 I. C. 146 = 1935 Cr. C. 227.

3. *Want of certificate invalidates trial* [P. 428, n. 9]—The obtaining of sanction is imperative and the omission to do so vitiates the trial. (1932) M. W. N. 1229 = A. I. R. 1933 M. 461 (1) = 5 M. Cr. C. 389 = 143 I. C. 190 = 34 Cr. L. J. 545 = 1933 Cr. C. 707; A. I. R. 1930 Pat. 501 = 11 P. L. T. 433 = 31 Cr. L. J. 384 =

122 I. C. 155 = 1930 Cr. C. 929 = 14 A. I. Cr. R. 71. Where the accused was arrested on 27th March and the Magistrate began to record evidence on 26th April, but the sanction of the Local Government was signed only on 15th May and no objection was taken till 24th July when the case was posted for argument, it was *held* by the Lahore High Court *following* 35 P. R. 1893 that the absence of a certificate is curable under s. 537. When no objection was raised to the proceedings before 15th May, it cannot be said that the accused was prejudiced. 16 Lah. 73.

4. **Form of certificate.**—All that the first proviso to the section requires is that it should be made known that the Political Agent is of opinion that the case should be tried in British India. No particular form of certificate being therefore required, one has to see in each case whether the Political Agent has expressed his own opinion to that effect. It is not necessary that that opinion, if it is in written form, should be signed by the Political Agent himself. It would be sufficient if that opinion is communicated by someone who is duly authorised to do so. 53 B. 97.

SECTION 190.

Notes.—1. **Proceedings against a witness**—Is s. 351 independent of s. 190? [*P.* 430, *n.* 5]—Where the Magistrate found that the case could not be properly decided without the addition of one of the witnesses as co-accused and ordered him to be tried along with the accused person, the Magistrate acted under s. 351. He cannot be said to have taken cognizance under s. 190 (1) (c) thereby making the provisions of s. 191 applicable. A. I. R. 1934 Rang. 193 = 35 Cr. L. J. 1312 = 151 I. C. 406 = 1934 Cr. C. 837.

2. **Magistrate taking cognizance of different offence as disclosed in evidence, does so under cl. (a)** [See *P.* 431, *n.* 6]—Once the parties are before the Court, the Magistrate can deal with the accused for any offence disclosed by the evidence. The evidence may and not infrequently does disclose offences other than those mentioned or implied, but it cannot be said that cognizance is taken of such new offences under Cl. (c) of sub-sec (1), for the double reason that the stage for the application of the sub-section itself is long past and the clause can have no application to the evidence produced in the case. Similar observations apply to cases where cognizance was initially taken under cl. (b). 12 Pat. 758.

3. **Magistrate issuing summons against person not named in the complaint** [*P.* 431, See *n.* 6 (a)]—Where the original complaint under the Prevention of Cruelty to Animals Act was filed against the employee and not against the owner and the Magistrate finding that under the Act the owner was also liable, issued summons to him, he acted under cl. (c) of this section and the trial was not without jurisdiction. 10 Pat. 847.

II.—CLAUSE (a)—COGNIZANCE UPON COMPLAINT.

4. **Complaint** [*P.* 434, *n.* 12]—Where the Sessions Judge made an order that from the evidence recorded in a certain case he found that there was sufficient material for proceeding against a witness under s. 411, I. P. C. and therefore ordered him to be arrested and produced before the Magistrate to be tried for the said offence, *held*, that the order contained all the ingredients necessary to constitute a complaint and the Magistrate took cognizance under cl. (a). A. I. R. 1935 Sind 1 = 28 S. L. R. 347 = 1935 Cr. C. 42. Where a Tahsildar wrote to the Sub-divisional Magistrate that certain persons committed an offence under s. 353, I. P. C. and requested that the said persons may be tried under the said section, all the ingredients of a complaint as defined in s. 4 (h) were present and the document was clearly a complaint. It was therefore not necessary for the Magistrate to have asked the accused under s. 191 whether they desired the case to be tried by another Magistrate. 53 A. 208.

5. **Police report, when a complaint** [*P.* 434, *n.* 12 (d)]—Where the police sent up a charge-sheet in a non-cognizable case, it can be treated as a complaint and the Magistrate can take cognizance of the matter. Even if the charge-sheet was not sufficiently specific as to the facts, the defect is cured under s. 529. A. I. R. 1932 B. 610 = 34 Bom. L. R. 901 = 33 Cr. L. J. 733 = 139 I. C. 231 = 1932 Cr. C. 868. A police report in a non-cognizable case need not be treated as a complaint because the Court could take cognizance upon a report in writing made by a police-officer under cl. (1) (b). At the same time the legislature has not removed the right of a police-officer like any other member of the public to file a formal complaint and ask the Court to take cognizance under cl. (1) (a). A. I. R. 1933 Sind 188 = 141 I. C. 879 = 34 Cr. L. J. 256 = 1933 Cr. C. 569; A. I. R. 1929 Pat. 514 = 10 P. L. T. 601 = 31 Cr. L. J. 55 = 120 I. C. 297 = 1929 Cr. C. 274. See *note 7 to s. 4 (1) (h)*.

6. **Proceedings instituted on report of Subordinate Magistrate falls under cl. (a).**—Where a complaint to the District Magistrate was referred to a Local Magistrate for inquiry as a result of which the Magistrate reported that proceedings should be taken against certain persons including the complainant, the report was a complaint within the meaning of s. 4 (b) and the District Magistrate took cognizance under sub-sec. (1) (a) of this section. *A. I. R. 1933 Pat. 87 = 13 P. L. T. 791 = 34 Cr. L. J. 237 = 141 I. C. 810 = 1933 Cr. C. 211.*

III.—CLAUSE (c)—COGNIZANCE UPON POLICE REPORT.

7. **What amounts to a police report [P. 437, n. 19]**—An application by the prosecuting Inspector praying that one of the prosecution witnesses who had given evidence in the previous case, be put on trial, is a report in writing by a police-officer under cl. (b). *A. I. R. 1933 A. 399 = 1933 A. L. J. 735 = L. R. 14 A. (Cr.) 176 = 34 Cr. L. J. 761 = 144 I. C. 380 = 1933 Cr. C. 652 = 20 A. I. Cr. R. 47.*

8. **Magistrate taking cognizance of case on information derived from police report acts under clause (b) [P. 438, n. 23]**—A complaint was made to the police of an offence under s. 379, I. P. C. and the police reported that the case appeared to be false. The Magistrate made an endorsement "false under s. 379. Action should be taken under s. 211, I. P. C." and the police filed a complaint under s. 211. *Held*, that the Magistrate took cognizance under clause (b). *A. I. R. 1929 Pat. 514 = 10 P. L. T. 601 = 31 Cr. L. J. 55 = 120 I. C. 297 = 1929 Cr. C. 274.*

IV.—CLAUSE (a) INFORMATION, KNOWLEDGE OR SUSPICION.

9. **Application of clause (a) [P. 439, n. 26]**—By this clause it was intended that a Magistrate should be able to bring his experience to bear upon any statements of facts made to him by an aggrieved person who might not know what his legal remedy was in given circumstances. *6 Luck. 354.*

10. **Magistrate acting under s. 436 may himself take cognizance.**—There is nothing to prevent a District Magistrate when moved to direct further inquiry under s. 436, from taking cognizance in his discretion of the complaint under s. 190 (1). *A. I. R. 1931 Pat. 50 = 1931 Cr. C. 146 = 130 I. C. 529 = 32 Cr. L. J. 543 = 16 A. I. Cr. R. 14 = 12 P. L. T. 729.*

11. **Has Magistrate no power to take cognizance on information derived by himself in another public capacity? [P. 440, n. 29]**—A Magistrate has power under cl. (c) to take cognizance of an offence on a report received by him in a different official capacity. To hold otherwise would be to add to the terms of s. 190 provisions which cannot be found therein. *8 Rang 246 following 43 M. 709.*

SECTION 191.

Note.—Omission to inform the accused of his rights under this section, not a mere irregularity [P. 443, n. 3]—The provisions of this section are mandatory. When cognizance is taken under s. 190 (1) (c) failure to inform the accused person of his right to have the case tried by another Court invalidates the proceedings. *A. I. R. 1934 Lah. 210 = 1934 Cr. C. 445 = 151 I. C. 792 = 35 Cr. L. J. 1407 ; A. I. R. 1934 A. 693 (1) = 3 A. W. R. 471 = 1934 A. L. R. 843 = 35 Cr. L. J. 1303 = 151 I. C. 357 = 1934 Cr. C. 866.*

SECTION 192.

Notes.—1. **Magistrate must have taken cognizance of the case before transfer.**—Where the Magistrate on the presentation of a petition under s. 145 examined the petitioner on oath, then ordered a police inquiry to be made and on receipt of the police report transferred it to another Magistrate, it was held that the Magistrate having applied his mind to the report and come to the conclusion that there was some basis for the complaint, had taken cognizance of the case before he transferred it. *55 A. 301 (F. B.)*

2. **When cases may be transferred [P. 445, n. 3]**—There is nothing to show that a Magistrate has power to transfer a case only when he first takes cognizance of it and that he cannot transfer it at any later stage. Cl. (1) means what it clearly appears to mean and a Magistrate is competent after framing a charge, to transfer the case to a Subordinate Magistrate if the offence is triable by him. *57 M. 827.*

3. **Magistrate cannot transfer case to another Court outside the District.**—If a Magistrate is empowered to make over a case to another Magistrate for inquiry and trial he can do so within the limits of his own jurisdiction, but the law has not given him power to send the case to another district outside his jurisdiction. *A. I. R. 1933 Pat. 643 (1) = 1933 Cr. C. 1491 = 147 I. C. 439.*

4. Effect of transfer [P. 446 n. 6]—The words “case of which he has taken cognizance” means nothing more than the judicial investigation into any offence of which he has taken cognizance. Where once the Sub-divisional Magistrate having taken cognizance of an offence on a charge-sheet submitted by the police has made over to a Subordinate Magistrate the case “for disposal” the whole case was made over and the Subordinate Magistrate had full seisin of it and it was not open to the Sub-divisional Magistrate unless he proceeded under s. 528 to pass any orders with regard to the case. 12 Pat. 341. Under s. 190 cognizance is taken of the offence and not necessarily of the individual offenders. Where therefore a Magistrate takes cognizance of an offence and transferred the case without excluding any of the persons mentioned in the police report, he has transferred the whole case for disposal. A. I. R. 1934 Pat. 467 = 15 P. L. T. 438 = 1934 Cr. C. 1062.

SECTION 193.

Note.—Power of Local Government to make over a particular case [P. 448, n. 7]—In 55 B. 576 (S. B.) *Madgavkar, J.* took the view that reading the sections in their context, it did not appear to have been the intention of the Legislature either under s. 9 (2) or s. 193 (2) to enable the making of an order with reference to any particular case. These sections like s. 267 contemplate general directions for the convenience of the people and the administration of justice and special orders where such general orders have to be modified by reason of circumstances affecting the population such as plague, flood, disturbances and the like. Whatever its powers under s. 178, neither by s. 9 nor by section 193 did the Legislature intend that the Local Government should interfere with the ordinary course of justice in a particular case or transfer a particular case from a particular judge to another particular judge. But *Patkar, J.* held that an order empowering a Judge to try a particular case does not contravene the provisions of s. 9 (2).

SECTION 194.

Note.—An information exhibited under this section should contain a statement of the charge as certain and detailed as an indictment. It ought never to include mere allegations as to the opinion of the executive without formulating a charge against anyone. A. I. R. 1933 F. C. 124.

SECTION 195.

Notes.—1. Relation between s. 195 and s. 476.—See note 1 to s. 476.

I.—COMPLAINT.

2. What would amount to a “complaint” [P. 452, See n. 3]—An allegation, though defective in form, can form the basis of a prosecution if it amounts substantially to a complaint. If there is an allegation that an offence has been committed by a person known or unknown, made orally or in writing and addressed to a Magistrate with a view to his taking action under the Code it will amount to a complaint. 1932 A. L. J. 155 = A. I. R. 1932 A. 190 = 1932 Cr. C. 206 = 140 I. C. 184 = 33 Cr. L. J. 948. An order merely granting sanction for the prosecution of the accused in the following terms : “Prosecution under s. 185, I. P. C. is sanctioned” does not amount to a complaint within the meaning of this section. 9 Luck. 594.

3. Notification of the offence mentioned in this clause as cognizable and non-bailable does not dispense with the necessity for a complaint under this sub-section.—Ordinance No. 5 of 1930 making the offence under s. 188, I. P. C. cognizable and non-bailable does not get rid of the requirements imposed by this section. As s. 190 stood before 1923, there was a doctrine to the effect that a report by the police in a non-cognizable case was not a police report within the meaning of s. 190 (1) (b) and the definition of “complaint” in the Penal Code which excluded from the category of complaint a report by a police-officer was held not to prevent a report in a non-cognizable case from being regarded as a complaint. That state of the law has now been materially altered and it is not now possible to say that by merely making this class of offence cognizable and non-bailable the necessity for a complaint under s. 195 (1) (a) has been dispensed with. 58 C. 971; 55 B. 322.

II.—WHEN COMPLAINT NECESSARY.

4. Is complaint necessary for offences committed prior to proceedings in Court? [P. 453, n. 7-A]—
(i) *Fabricating false evidence* [P. 454, n. 7-A (i)]—This section does not apply to an offence committed under s. 193, I. P. C., in respect of proceedings in a Court of law which are contemplated but which in fact are never started. 56 B. 213.

(ii) *False charge* [P. 454, n. 7-A (ii) and P. 476, n. 98]—The accused lodged information with the police which the police found to be false. The police preferred a complaint to the Magistrate against the accused, of offences under ss. 211 and 182, I. P. C. The Magistrate took cognizance only of the offence under s. 182. The accused then filed a petition before the Magistrate asserting that the charge which he had made was true and offered to prove it. No orders were passed on this application and the Magistrate committed the accused to the Sessions on a charge under s. 211, I. P. C. It was held that the Magistrate not having originally taken cognizance of the offence under s. 211 on the complaint of the police-officer, the application of the accused to substantiate the charge brings s. 195 (1) (b) into operation and the complaint of Court was necessary for the prosecution under s. 211. 11 Pat. 155. But where the Magistrate had taken cognizance of the police complaint under s. 211, I. P. C., nothing that could subsequently happen, such as the filing of a protest petition and nothing in s. 195 (1) (b), Cr. P. C., could operate to deprive him of jurisdiction to proceed thereon according to law. 13 Pat. 789 *over-ruling* 110 I. C. 212 = 29 Cr. L. J. 660; A. I. R. 1930 Pat. 30 = 10 P. L. T. 618 = 30 Cr. L. J. 554 = 116 I. C. 46 = 150 Cr. C. 6 = 12 A. I. Cr. R. 427. Where the person giving information to the police did not confine himself to reporting what he knew of the facts, stating his suspicions and leaving the matter to be further investigated by the police but definitely alleged his belief in the guilt of the complainant, it amounts to a charge. The injured party could file a complaint against him under s. 211, I. P. C. and the fact that the accused filed a similar complaint before the Magistrate subsequently, does not make the offence under s. 211, I. P. C., one committed in or in relation to a proceeding in Court. A. I. R. 1934 Rang. 21 = 35 Cr. L. J. 1259 = 151 I. C. 185 = 1934 Cr. C. 192. The mere fact that a complaint made by the accused to the police was put before the Magistrate as being false, who ordered further investigation to be stopped, does not amount to his having taken cognizance of the case. It was not a case which the Magistrate had taken any judicial notice of nor were the proceedings judicial proceedings at all. Hence the police could prefer a charge under s. 211, I. P. C. without the intervention of the Magistrate under s. 195, Cr. P. C. 66 M. L. J. 253 = (1933) M. W. N. 873 = 39 M. L. W. 204 = A. I. R. 1934 M. 175 = 1933 M. Cr. C. 308 = 35 Cr. L. J. 693 = 143 I. C. 693 = 1934 Cr. C. 323.

(iii) *Forgery, etc.* [P. 455, n. 7-A (iii)]—Though the words "in or in relation to a proceeding in that Court" which appears in cl. (b) does not appear in cl. (c), its absence from cl. (c) cannot affect the jurisdiction conferred by s. 476 so that whether the offence mentioned be one under cl. (b) or cl. (c) it must appear to have been committed in or in relation to a proceeding before the Court that makes the complaint. It is indispensable that it must in some manner have affected those proceedings or been designed to affect them, or come to light in the course of them and an offence committed after their close is wholly outside the scope of the provisions. 55 M. 531. Even where the use as genuine, of a forged document is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used, is necessary under this section. A. I. R. 1950 M. 669 = 59 M. L. J. 229 = 32 M. L. W. 273 = (1930) M. W. N. 689 = 3 M. Cr. C. 247 = 32 Cr. L. J. 219 = 129 I. C. 72 = 1930 Cr. C. 1125. Sub-section (1) (c) is not limited to offences committed in the course of the proceedings in Court. Where a document has been produced in Court by a party to a proceeding before it, the complaint of the Court is necessary for his prosecution in respect of an antecedent forgery and antecedent user before a Sub-Registrar. A. I. R. 1932 Sind 90 = 26 S. L. R. 73 = 157 I. C. 341 = 33 Cr. L. J. 452 = 18 A. I. Cr. R. 151 = 1932 Cr. C. 530 *following* 44 C. 1002. See notes 11 to 13, s. 476.

5. *Whether complaint of Court necessary against persons not parties to proceedings* [P. 456, n. 10]—When an offence of forgery is committed by more than one person, one at least being a party to the proceeding in which a document is produced, such participants in the forgery as are not parties to the proceeding may be prosecuted otherwise than under the provisions of ss. 195 and 476. 28 M. L. W. 769 = A. I. R. 1929 M. 115 = 2 M. Cr. C. 39 = 30 Cr. L. J. 469 = 115 I. C. 481 = 12 A. I. Cr. R. 299. See note 10 to s. 476.

6. *Whether complaint of Court necessary for abetment* [P. 456, n. 11]—A private complaint can be made against a person who abets an offence for which a complaint of Court should in the first place be obtained under this section. A. I. R. 1934 Sind 78 (1) = 35 Cr. L. J. 1251 = 151 I. C. 60 = 1934 Cr. C. 623 *following* A. I. R. 1928 Lah. 787.

7. *That the Court was acting without jurisdiction does not dispense with necessity for complaint.*—It cannot be held that an offence under s. 193, I. P. C., which is not cognizable without the complaint of the Court concerned or some Court to which it is subordinate would be cognizable on the complaint of some other person or body when the Court itself was acting without jurisdiction. 61 C. 792.

Effect of absence of complaint.—See note 30 to s. 537.

8. When facts disclose graver offence requiring complaint of Court, charge cannot be confined to minor offence only.—When a complaint sets forth certain facts disclosing a minor offence and also a graver one, the prosecution should ordinarily be for the graver offence. If there is a legal bar to taking cognizance of the graver offence by the reason of a want of complaint by the Magistrate, the legal consequence cannot be evaded by confining the case to the minor offence alone. Where the complaint disclosed not only a false charge made to the police but also a false charge subsequently made to the Magistrate on the strength of the same facts, the case should not be taken cognizance of without a written complaint by the Magistrate under s. 195 (1) (b). **54 M. 1018.** Where the facts disclosed an offence under s. 193, I. P. C. for which a complaint of Court was necessary, and also an offence under s. 471, I. P. C. for which no such complaint was necessary as the person was not a party or witness to the proceeding in Court, a Court cannot take cognizance of the offence under s. 471 alone thus avoiding the necessity of a complaint of Court. (1933) **M. W. N. 217 = 37 M. L. W. 547 = A. I. R. 1933 M. 413 = 1933 Cr. C. 566 = 1933 M. Cr. C. 200 = 34 Cr. L. J. 800 = 144 I. C. 519; 55 M. 343; 56 M. L. J. 203 = 28 M. L. W. 637 = (1929) M. W. N. 196 = A. I. R. 1929 M. 21 = 2 M. Cr. C. 19 = 30 Cr. L. J. 322 = 114 I. C. 360.** This does not imply that a Court's complaint of fabricating false evidence should not be entertained unless there is also a complaint of forgery, if the facts alleged disclose forgery, nor that when a Court has properly complained of fabricating false evidence, the trying Magistrate cannot frame a charge of forgery also if the evidence supports it. **23 M. L. W. 774 = A. I. R. 1929 M. 74 = 2 M. Cr. C. 35 = 30 Cr. L. J. 370 = 114 I. C. 834.** When upon the facts, the commission of several offences is disclosed, some of which require sanction and others do not, it is open to the complainant, if he so wishes, to proceed in respect of those only which do not require sanction. **56 C. 1041.** A person who applies to a Magistrate for an order under s. 144 institutes a criminal proceeding against that person within the meaning of s. 211, I. P. C. and if a complaint is made against such applicant for defamation in respect of statements made in the application under s. 144, the question of a major offence under s. 211, I. P. C. and of a minor offence under s. 499, I. P. C. is immaterial and no complaint of Court is necessary for entertaining the complaint of defamation. (1933) **M. W. N. 1263.**

III.—WHAT IS A COURT?

9. Meaning of the word "Court" [*P. 457, n. 19*].—The definition in this section has been amplified, the word 'include' being substituted for 'means' in 1923. There are Courts outside the criminal, civil and revenue Courts. The Election Commissioners constitute such a Court. The Income-tax Commissioners are such a Court. Similarly the Commissioners appointed under Act XXXVII of 1850 [Public Servants (Inquiries) Act] are such a Court. **12 Lah. 391.** To determine whether a tribunal is or is not a "Court" one has to look not to the source of the tribunal's authority or to any peculiarity in the method adopted of creating it, but to the general character of its powers and activities. If it has power to regulate legal rights by the delivery of definitive judgments, and to enforce its orders by legal sanctions and if its procedure is judicial in character in such matters as the taking of evidence and the administration of the oath, then it is a "Court." Applying these tests, an Election Commissioner, though described as a *persona designata* in the rules for the decision of disputes as to the validity of elections under the Madras Local Boards Act, is a "Court." Further he is a "Civil Court" for the purposes of this section and s. 476. (1935) **M. W. N. 152 (2).** An Assistant Registrar of Co-operative Societies before whom a suit is filed by a Society for the recovery of amounts due by its members is a "Court." **A. I. R. 1930 M. 869 = 59 M. L. J. 229 = 32 M. L. W. 273 = (1930) M. W. N. 639 = 3 M. Cr. C. 247 = 32 Cr. L. J. 219 = 129 I. C. 72 = 1930 Cr. C. 1125.** The Income-tax officer in an inquiry as to the truth or falsity of a return submitted by an assessee is a Revenue Court. **8 Rang. 25.** The Governor in Council to whom an appeal is presented against the order of the Conservator of Forests, is not a Court. The member of Council who dealt with the appeal is not a Court even though he might have observed the procedure analogous to that of a legal tribunal. **59 C 1233.** The Collector holding an investigation under s. 14, Putni Regulation (8 of 1819) is a Court. **61 C. 792.** The term "Court" does not include a Registrar under the Registration Act, 1877. **57 M. 632.** A Magistrate recording a statement under s. 164 is a "Court" within the meaning of s. 195 and cognizance cannot be taken of an offence punishable under s. 193, I. P. C. when it was alleged to have been committed in the proceedings under s. 164, without a complaint in writing of such Court or some other Court to which it was subordinate. **A. I. R. 1935 A. 341 = 1935 A. L. J. 223.** A Tahsildar holding an inquiry regarding the transfer of names in the land register is a Revenue Court. (1934) **M. W. N. 612.** But a Deputy Tahsildar holding an inquiry while dealing with an application for darkhast is not a Court as he is not authorised to hold such an inquiry. (1934) **M. W. N. 618.**

IV.—SUBORDINATION OF PUBLIC SERVANTS.

10. Complaint of offence under ss. 172 to 193, I. P. C. to be made by public servant concerned or of some other public servant to whom he is subordinate.—Where certain persons rescued a Judgment-debtor

from the lawful custody of the bailiff of the Court of the Subordinate Judge, the Subordinate Judge being the official superior of the bailiff is a proper person to make a complaint under ss. 183 and 186, I. P. C. and the mere fact that the Subordinate Judge described the complaint as one under s. 476, Cr. P. C. will not make the complaint any the less a complaint under s. 195(1) (a). *A. I. R. 1934 Oudh 277 = 11 O. W. N. 720 = 1934 O. L. R. 510 = 35 Cr. L. J. 990 = 149 I. C. 377 = 1934 Cr. C. 773.* Where the accused sent a telegram to the District Magistrate which was inquired into by the Sub-divisional Magistrate who found it to be false, the Sub-divisional Magistrate cannot file a complaint under instructions from the District Magistrate, as the District Magistrate is not a subordinate of the Sub-divisional Magistrate. (1934) *M. W. N. 954.*

11. Trying Magistrate cannot make a complaint under s. 182, I. P. C. for giving false information to Police.—Certain persons sent a petition to the Superintendent of Police making allegations of extortion and bribery against a Police Sub-Inspector. The Sub-Inspector was put on trial and was acquitted and the trying Magistrate made a complaint against the signatories to the petition for prosecuting them under ss. 211 and 182, I. P. C. It was held that as the false information was given to the Superintendent of Police and no complaint was made by him or by his superior, the proceedings under s. 182, I. P. C. were invalid. The charge under s. 211 was also unsustainable as the petition to the Superintendent of Police is not an institution of criminal proceedings. 59 *C. 334.*

12. Subordination of police to District Magistrate [*P. 460, n. 29*].—The District Magistrate has jurisdiction under sub-sec. (5) to order the withdrawal of a complaint made by the police. The expression "any authority to which such public servant is subordinate" in sub-sec. (5) connoting a more distant and general entity than departmental superior covers the District Magistrate in relation to the police of the District. *A. I. R. 1930 Pat. 98 = 11 P. L. T. 88 = 30 Cr. L. J. 710 = 117 I. C. 87 = 1930 Cr. C. 74.*

13. District Magistrate cannot make a complaint for offence committed in a civil proceeding in a Village Panchayat.—A Village Panchayat having come to the conclusion that a person made a false statement and used a forged document in a case before it, sent a report to the Collector, who as District Magistrate made a complaint under ss. 467 and 471, I. P. C. It was held that in a matter where the Village Panchayat was acting as a Civil Court, the District Magistrate had no jurisdiction. It was subordinate to the principal Court having original Civil jurisdiction in the district, namely, the District Judge. 52 *A. 1018*; (1933) *M. W. N. 1423.* In a case where the date on the suit promissory note was altered to save limitation, the Panchayat sent the papers to the Collector who forwarded them to the Sub-divisional Magistrate for inquiry. The Sub-divisional Magistrate after inquiry made a complaint purporting to act under s. 476. It was held that he had no authority to make a complaint as the offence was not committed in or in relation to a proceeding in his Court. Even the Collector could not make a complaint as the Panchayat was subordinate only to the principal Court of original jurisdiction, namely, the Court of the District Judge. 1934 *A. L. J. 339 = A. I. R. 1934 A. 216 = 4 A. W. R. 519 = 35 Cr. L. J. 1050 = 149 I. C. 1239 = 1934 Cr. C. 326.*

14. Additional Judge, Small Cause Court—Whether official superior of the Bailiff of the Court.—The Bailiff of the Small Cause Court was obstructed by the accused, in the discharge of his public duties. The Judge of the Small Cause Court who is the official superior of the Bailiff issued a notice to the accused to show cause why a complaint should not be made against him for an offence under s. 186, I. P. C. The proceedings were then made over by the Judge to the Additional Judge for disposal and the latter decided to prosecute the accused. It was held that under s. 8 (2), Provincial Small Cause Courts Act, the Additional Judge had the same powers as the Judge in this matter which had been assigned to him by the Judge, and the complaint by him was valid. 13 *Lah. 16.*

15. Subordinate Judge is subordinate to the District Judge.—For the purposes of this section the Court of the Subordinate Judge is subordinate to that of the District Judge notwithstanding that with reference to the subject-matter of the particular litigation, an appeal lies to the High Court. *A. I. R. 1931 Sind 163 = 25 S. L. R. 196 = 133 I. C. 72 = 32 Cr. L. J. 1012.*

See note 3 to s. 476-B as to subordination of Courts.

VII.—WHO CAN MAKE A COMPLAINT.

16. Complaint may be made by the Superior Court in the first instance [*P. 463, n. 43*].—Even before Act V of 1898, was passed the High Court had jurisdiction to order prosecution in matters similar to those dealt with in this section. The existing jurisdiction of a Supreme Court cannot be taken away unless the language used in the enactment which purports to take away the jurisdiction is in the clearest possible terms.

The High Court has therefore power to order prosecution while exercising powers as an Appellate Court. An offence committed in relation to a proceeding in a trial Court is also one committed in relation to an appeal from the decision of that Court. A person committing perjury in the trial Court must be held to have intended that his perjury should not only influence the proceedings in the trial Court but also subsequent proceedings which might take place, if either party to the case in the trial Court took the matter in appeal. 53 A. 799.

17. Court trying the case must make complaint and not Court transferring [*P. 464, n. 47*].—The accused attempted to fabricate evidence in a proceeding before the Second Class Magistrate. Subsequently the proceedings were transferred to the First Class Magistrate who heard and disposed of the case. Proceedings were started against the accused for fabricating false evidence and the complaint of the First Class Magistrate was obtained for the purpose. It was contended that the complaint of the Second Class Magistrate was necessary as the offence was committed in or in relation to a proceeding before him. *Held* that in the case of an attempt to fabricate false evidence the Court which must file the complaint is the Court which ultimately deals with the case and in which the false evidence if the attempt had succeeded, would have been given, *i.e.*, the First Class Magistrate. 36 Bom. L. R. 221 = A. I. R. 1934 B. 185 = 35 Cr. L. J. 843 = 143 I. C. 1011 = 1934 Cr. C. 663.

XI.—NOTICE TO ACCUSED.

18. Whether notice to accused is necessary [*P. 471, n. 78*].—A person against whom a complaint of an offence mentioned in sub-section (1) is made, is no more entitled to an opportunity to show cause why the complaint should not be made than a person against whom a complaint of any other offence is made. 11 Pat. 155; A. I. R. 1930 Pat. 30 = 116 I. C. 46 = 1930 Cr. C. 6 = 30 Cr. L. J. 554; A. I. R. 1929 Pat. 92 = 10 P. L. T. 77 = 30 Cr. L. J. 545 = 115 I. C. 832 = 12 A. I. Cr. R. 363. The Code gives the Magistrate full discretion in the matter, but the discretion must be exercised judicially. A. I. R. 1933 C. 806 (2) = 144 I. C. 846 = 1933 Cr. C. 970 = 34 Cr. L. J. 833.

XIII.—COMPLAINT OF COURT IN RESPECT OF INSTITUTING FALSE CHARGES, Etc.

19. Before making complaint opportunity should be given to accused to prove his case [*P. 474, n. 93*].—*See* note 16 to s. 476.

20. Before making complaint case must be judicially determined [*P. 475, n. 95*].—It is improper to prosecute the complainant, before the complaint in respect of which he was to be prosecuted was finally disposed of under s. 203 or otherwise. A. I. R. 1929 Pat. 92 = 10 P. L. T. 77 = 30 Cr. L. J. 545 = 115 I. C. 832 = 12 A. I. Cr. R. 363.

21. No complaint of Court necessary when charge laid before Police only [*P. 476, n. 97*].—There is no institution of criminal proceedings when a person makes a false charge of a non-cognizable case against another to the police, as the police have no power to take any proceedings in non-cognizable cases without the order of a Magistrate. 59 C. 334. Where false information was given to the police and the matter did not go further than a police inquiry on the information, a complaint of Court was not necessary. A. I. R. 1930 A. 818 = L. R. 11 A. (Cr.) 173 = 32 Cr. L. J. 314 = 129 I. C. 369 = 1930 Cr. C. 1202 = 14 A. I. Cr. R. 434. But if the information to the police is followed by a complaint to the Magistrate, the complaint of such Magistrate under this section is necessary. 23 S. L. R. 285 = A. I. R. 1929 Sind 132 = 30 Cr. L. J. 732 = 117 I. C. 147 = 1929 Cr. C. 160. *See* notes 11 to 13, s. 476.

22. Complaint is necessary if charge before police is judicially dealt with [*P. 476, n. 98*].—*See* note 4, *supra*.

XIV.—COMPLAINT OF COURT IN RESPECT OF FORGED DOCUMENTS.

23. Party to any proceeding.—When the presence of the accused is dispensed with and he is permitted to appear by Vakil, the Vakil does not thereby become a "party" for the purposes of s. 195 (1) (c). 28 M. L. W. 769 = A. I. R. 1929 M. 115 = 2 M. Cr. C. 39 = 30 Cr. L. J. 469 = 115 I. C. 431 = 12 A. I. Cr. R. 299. An offence which has already been committed by a person who does not become a party till about 30 years after the commission of the offence cannot be said to have been committed "by a party" within the meaning of clause (c). The clause applies only to cases where an offence is committed by a party as such, to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceeding. 53 A. 304 (S. B.). In an application for execution of a decree the judgment-debtor filed a receipt purporting to have been given by the decree-holder. On the date on which the receipt was given there was no actual Civil proceeding

between the parties. It was held that though the document was actually signed before the final execution proceedings were instituted, since the litigation between the parties had begun long before, it can only have been with reference to that litigation that the document was drawn up and therefore if there was forgery, the forgery was committed in or in relation to a proceeding in Court and by a party to a proceeding in Court. **A. I. R. 1932 Rang. 139 = 1932 Cr. C. 702 = 140 I. C. 44 = 33 Cr. L. J. 919.** Where the accused filed a suit in the High Court on the strength of a forged document, and allowed the same to be dismissed for default, a complaint against the accused under s. 471, I. P. C. filed prior to the institution of the Civil Suit does not require the sanction of the Court. **56 C. 1031.**

24. The mere filing of a document may constitute a user within the meaning of s. 471, I. P. C. [P. 478, n. 107]—Where from an interest in or desire to assist the defence the accused filed a document for the purposes of the suit in advance of a trial, it amounts to "using" the document. **49 C. L. J. 193 = A. I. R. 1929 C. 203 = 30 Cr. L. J. 556 = 116 I. C. 532 = 13 A. I. Cr. R. 73.** The section is applicable not only in cases where the document has been given in evidence but also in cases where it has been produced, the ambit of the word "produced" being very wide. **A. I. R. 1929 Pat. 60 = 9 P. L. T. 800 = 30 Cr. L. J. 236 = 113 I. C. 712 = 12 A. I. Cr. R. 236.**

25. Clause (e) is confined to forgery and offences of which forgery is an element [P. 479, See n. 108]—Clause (e) does not cover an offence under s. 477-A, I. P. C. This clause refers to offences punishable under s. 463 (forgery) and that would no doubt include the various offences of which forgery was an element. But s. 477-A, I. P. C. does not contain any reference to forgery. **A. I. R. 1932 Sind 53 = 1932 Cr. C. 194 = 25 S. L. R. 471 = 33 Cr. L. J. 328 = 136 I. C. 766.**

26. Complaint of Court not necessary in respect of a document produced in Court in a prosecution founded upon it.—Where the accused was originally committed to the Sessions under s. 218, I. P. C. and the Sessions Judge framed a fresh charge of forgery against the accused, it cannot be contended that the complaint of the Magistrate before whom the document was produced, is necessary for framing a charge of forgery. The document was produced in Court not in connection with any other case but in a prosecution founded upon it for the purpose of convicting the accused for an offence in relation to it and no question of giving sanction by the committing Magistrate could arise when he himself was considering the question of what charge should be framed on that document. **56 B. 488.**

27. Criminal Court not bound by finding of Civil Court making complaint.—A Criminal Court is not precluded from coming to a finding different from that of a Civil Court making the complaint as regards the genuine nature of the document, especially when the finding of the Civil Court is one against which the person affected by it could not appeal because he was successful in the suit on other grounds. **A. I. R. 1933 G. 431 = 143 I. C. 15 = 34 Cr. L. J. 526 = 1933 Cr. C. 794.**

SECTION 196.

Amendment.—After the word, figures and letter "section 294-A" the words, figures and letter "or section 295-A" shall be inserted—**Act XXV of 1927.**

SECTION 196-A.

Notes.—1. Object and Scope of the Section [P. 483, n. 3]—Where the charge is of criminal conspiracy to commit a cognizable offence punishable with death, transportation or rigorous imprisonment for a term of two years or more, no consent of the Local Government, etc., is necessary. **A. I. R. 1934 A. 61 = 1934 A. L. J. 852 = 1934 Cr. C. 130 = 151 I. C. 442 = 35 Cr. L. J. 1349.** Where the charge specified the object of the criminal conspiracy as being to commit criminal breach of trust (a cognizable offence) the mere fact that the charge also indicated the subsidiary object of concealing the offence and preventing its detection from which additional charges under ss. 467 and 477, I. P. C. were framed, does not warrant the contention that as the offences of forgery and destruction of records under ss. 467 and 477, I. P. C. are non-cognizable offences, sanction was necessary under s. 196-A., Cr. P. C. **57 M. 545.**

2. Magistrate cannot direct Public Prosecutor to obtain sanction.—The law does not require the Magistrate to direct the Public Prosecutor to get sanction from the Government so as to validate any proceedings, pending before him. If the sanction is wanting he has no jurisdiction to entertain the complaint, and he may dismiss the complaint or if moved by the Public Prosecutor grant him time to obtain the necessary sanction. **A. I. R. 1934 Sind 4 = 35 Cr. L. J. 812 = 148 I. C. 687 = 1934 Cr. C. 89.**

3. Magistrate giving consent under cl. (2) not disqualified from trying case.—The order consenting to the initiation of proceedings under cl. (2), s. 196-A stands on a very different footing from a complaint made under s. 195. A public servant who or a Court which makes a complaint under s. 195 can on no account be allowed to take part in holding the trial. But the consent under cl. (2), s. 196-A has to be obtained only to ensure that an accused person is not unnecessarily harassed. To determine whether consent should be given, the Magistrate has to see not whether the allegations against the accused are true but whether, if true, they would make out a case of such a nature as would require a trial in the interests of public justice. **A. I. R. 1934 C. 391 = 38 C. W. N. 581 = 1934 Cr. C. 532 = 35 Cr. L. J. 714 = 148 I. C. 558.**

4. Presidency Magistrate must also be empowered to consent.—The words “empowered in this behalf by the Local Government” govern not only “District Magistrate” but also “Chief Presidency Magistrate.” It is much more likely that the Legislature intended to class Chief Presidency Magistrates with District Magistrates, rather than put the Chief Presidency Magistrate in a class with the Local Government and differentiate him from a District Magistrate. The Chief Presidency Magistrate has therefore no power to give the requisite consent without being empowered to do so by the Local Government. **58 B. 480.**

5. Effect of absence of consent [P. 484, n. 5].—The intention of the Legislature is that prosecutions under s. 120-B, I. P. C. should not be started indiscriminately. It would be violating the spirit underlying s. 196-A if a person were allowed to be convicted of an offence under s. 120-B, I. P. C. even though his prosecution under that section is neither sanctioned by the District Magistrate nor was within the contemplation of the officer making a complaint under s. 476. **13 Pat. 729.** When the accused was tried on several charges, some of which required sanction and some did not, the whole trial was vitiated when no sanction was obtained for those offences which required sanction. **57 C. 99.** Where the accused were prosecuted under ss. 467 and 471 read with s. 120-B, I. P. C. and the trial proceeded to the stage of taking the opinion of the assessors, when it was brought to the notice of the Court that the necessary sanction had not been obtained, the trial could not be proceeded with as the whole proceedings were void *ab initio*. Neither he nor any other Court had any power on those proceedings to record a judgment of either acquittal or conviction. A new inquiry has to be started under Ch. XVIII on a fresh complaint with the requisite sanction. **12 Pat. 353.** But when no objection is taken on the ground of want of consent in writing under this section at any stage of the inquiry or trial, the verdict of the jury and the conviction based thereon cannot be held to be illegal merely because the previous consent of the Local Government had not been taken before the prosecution is started. **A. I. R. 1932 C. 786 = 150 I. C. 723 = 34 Cr. L. J. 56 = 1932 Cr. C. 829.** The fact that the sanction of the Local Government was obtained in the course of the trial, does not vitiate the proceedings if the accused had not been prejudiced thereby. **A. I. R. 1935 C. 316.**

SECTION 197.

I.—JUDGE AND PUBLIC SERVANTS.

Notes.—1. Sanction not necessary where public servant is removable from office without sanction of Government [P. 486, n. 5].—President of Local Board.—The President of a Union Board under the Madras Local Boards Act is not a public servant “who is not removable save by or with the sanction of a Local Government or some higher authority,” but is removable by the President of the District Board. But a President of a Union Board accepting or rejecting a nomination paper after scrutiny under the rules for the conduct of Elections, is giving a definitive judicial decision and is therefore a Judge who is protected by this section. **A. I. R. 1929 M. 175 = 2 M. Cr. C. 143 = 30 Cr. L. J. 365 = 114 I. C. 817.** The President of a Taluk Board under the Bombay Local Boards Act is a public servant not removable from office except by the Local Government. **A. I. R. 1933 Sind 161 = 27 S. L. R. 3 = 34 Cr. L. J. 191 = 141 I. C. 583 = 1933 Cr. C. 525.**

Municipal Councillors, Bombay.—Since the amendment of the Bombay District Municipalities Act by Bombay Act III of 1915 Municipal Councillors are removable without the sanction of the Governor in Council. They are removable by the Commissioner. **A. I. R. 1932 Sind 177 = 1932 Cr. C. 792.**

Members of Village Panchayat Court.—The members of a Village Panchayat Court are Judges within the meaning of this section: The protection of the section is not confined merely to acts strictly within the authority of the judge or public servant but extends to all official acts purporting to be done under colour of that authority. **A. I. R. 1931 M. 492 = (1930) M. W. N. 1109 = 4 M. Cr. C. 30 = 1931 Cr. C. 556 = 133 I. C. 2 =**

32 Cr. L. J. 969. A Village Court executing a decree by way of distraint under s. 48, Madras Village Courts Act, is a Court and the Village Munsiff distraining is acting as a Judge of that Court. **56 M. L. J. 600 = (1929) M. W. N. 67 = 29 M. L. W. 579 = A. I. R. 1929 M. 256 = 2 M. Cr. C. 59 = 30 Cr. L. J. 402 = 115 I. C. 53 = 12 A. I. Cr. R. 370.**

Village Karnam.—A Village Karnam alleged to have committed an offence while acting as Village Magistrate, can claim the benefit of this section. **(1932) M. W. N. 1075 = A. I. R. 1933 M. 270 = 5 M. Cr. C. 361 = 1933 Cr. C. 373 = 143 I. C. 102 = 34 Cr. L. J. 526.**

Administrative officer of School Board under Bom. Act IV of 1923.—The administrative officer of a School Board appointed under s. 9 (1) Bombay Primary Education Act, can be removed from office without the previous sanction of the Government on the vote of a two-thirds majority of its members. Hence no sanction is necessary for his prosecution. **A. I. R. 1931 B. 527 = 33 Bom. L. R. 1177 = 1931 Cr. C. 959 = 134 I. C. 1240 = 33 Cr. L. J. 78.**

Employees of Local Boards.—A clerk under a District Board constituted under the U. P. District Boards Act, is not a Government servant and s. 197 does not apply to him. **A. I. R. 1934 A. 173 = 1933 A. L. J. 1628 = 1934 A. L. R. 373 = 35 Cr. L. J. 617 = 143 I. C. 218 = 1934 Cr. C. 229.**

Sub-Inspectors of Excise, Burma.—Sub-Inspectors of Excise in Burma are public servants not removable from office save by or with the sanction of the Local Government. Though the power of appointment has been delegated to the Commissioners of Divisions, yet the appointment must be deemed to be made by the Local Government and the protection afforded by this section applies to such persons. **12 Rang. 530; A. I. R. 1935 Rang. 165.**

Receiver appointed by Court.—A Receiver appointed by Court is not a public servant covered by this section. No sanction is therefore necessary for prosecuting him in respect of offences connected with the management of the estate of which he is the Receiver. **36 Bom. L. R. 649 = A. I. R. 1934 B. 306 = 35 Cr. L. J. 1403 = 151 I. C. 707 = 1934 Cr. C. 1038.**

2. Status of accused at the time of the commission of offence is material.—It is the status of the accused at the time of the commission of the alleged offence and not his status at the time of the complaint or of the order issuing process which is material for the purposes of this section. **A. I. R. 1932 Sind 177 = 1932 Cr. C. 792.**

3. Effect of delegation by Government of the power of removal [P. 486, n. 6].—This section does not apply to public servants the power to remove whom has been delegated by the Local Government, to some lower authority. Where a Police Constable and a Sub-Inspector of Police were prosecuted for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty, no sanction was required under this section as they were removable from their office by a lower authority than the Local Government. **(1935) M. W. N. 457 = 41 M. L. W. 558 = 68 M. L. J. 608 = A. I. R. 1935 M. 442 = 1935 M. Cr. C. 157** where the contrary view in **(1916) 1 M. W. N. 384** and **(1934) M. W. N. 370** was not approved. See **12 Rang. 530** where it was held that though the power of appointment of Sub-Inspectors of Excise had been delegated to the Commissioners of Divisions, yet the appointment must be deemed to be made by the Local Government and such persons were protected by this section.

II.—OFFENCES FOR WHICH SANCTION IS REQUIRED.

4. Acting or purporting to act in the discharge of official duty.—After the amendment in 1923 the words "is accused as such judge or public servant of any offence" have been replaced by the words "is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty." The obvious effect of this amendment is that the scope of the protection has been widened and some of the earlier decisions are no longer good law. The nice question whether the judge or public servant was accused as such will no longer arise. The only question will be—was he accused of committing an offence while acting or purporting to act in the discharge of his official duty. In order to attract s. 197 the offence must be so connected with the official act as to form part of the same transaction and be inseparable from it. **14 Pat. 299.** All that is necessary to be found under the present section is that the public servant has committed the act at a time when he was performing an official duty. **A. I. R. 1935 Nag. 52 = 18 N. L. J. 28 = 1935 Cr. C. 270; 52 M. 347.** The words "official duty" is not to be interpreted in a narrow sense as referring only to duty properly attaching to the office from which only the Local Government or some higher authority can remove the officer or by sanction

permit his removal. There are occasions when public servants are called upon to perform and do properly and legally perform duties which do not fall strictly and literally within the tasks appertaining to the particular appointment or office which they may at the moment be holding. 62 C. 275. Where the allegation was that the Village Magistrate sent his talayari to fetch the complainant in connection with a case before him in which she had not appeared and sentenced her to imprisonment in the chavadi for disobeying the summons and accordingly confined her in his chavadi, on a complaint against the Magistrate for wrongful confinement, it was held that he was acting in the discharge of his duty as a Magistrate. 52 M. 602. In a later decision *Wallace, J.* distinguished this ruling as not intending to lay down that for any act whatsoever amounting to an offence done by the Village Munsiff during the time he was discharging or purporting to discharge his official duty, whether it had any connection with his official duty or not, sanction would be required for his prosecution. The phrase "while acting or purporting to act in the discharge of his official duty" means doing or purporting to do the sort of act which the law or rules framed under the law allow him to do by virtue of his office. It must be an act which has some connection other than accidental or temporary with what he is doing or purporting to do in the exercise of his official duty, *i.e.*, be the sort of act which he is empowered to do by virtue of his office. Where therefore a Village Munsiff suspecting certain persons of murder, confined them in the village chavadi and tortured them to extract a confession, it was held that sanction was necessary for prosecution under ss. 343 and 348, I. P. C. but not for an offence under s. 330, I. P. C. A. I. R. 1932 M. 214 = 35 M. L. W. 61 = (1932) M. W. N. 63 = 62 M. L. J. 223 = 1932 Cr. C. 156 = 5 M. Cr. C. 34 = 138 I. C. 133 = 33 Cr. L. J. 557 = 18 A. I. Cr. R. 271.

5. **Acts held to be done in discharge of official duty.**—Sanction under this section is required for the prosecution of a Village Munsiff or a Village Magistrate for fabricating a record in a proceeding before him. 52 M. 347; 52 M. 602. For the prosecution of a member of the District Board who had been duly appointed to conduct the sale of impounded cattle and who had closed the sale in the name of his own servant for his own benefit, sanction is required. A. I. R. 1925 Oudh 565 = 26 Cr. L. J. 1157 = 28 O. C. 155 = 88 I. C. 517. Sanction is required for the prosecution for defamation of a Subordinate Judge for making certain observations alleged by the complainant to be defamatory, in his order rejecting an application presented to him in the course of his duties. A. I. R. 1931 Oudh 392 = 1931 Cr. C. 824 = 32 Cr. L. J. 991 = 132 I. C. 783. Where the Magistrate was alleged to have used insulting language towards the complainant while the complainant was being examined as a witness in a case, sanction was necessary for instituting proceedings against the Magistrate. The test is whether the officer at the particular moment was actually engaged in or purporting to be engaged in the discharge of his official duty. A. I. R. 1934 A. 978 = 4 A. W. R. 666 = 1934 A. L. R. 1152 = 153 I. C. 403 = 1934 Cr. C. 1302. Where the accused, the President and Health Officer of a Municipal Committee were alleged to have entered the house of the Vice-President under the pretext of inspecting a new waterpipe connection and while leaving the house stated to others that the complainant (Vice-President) had not paid for the connection, had stolen Municipal property and was stealthily using Municipal labour, it was held that s. 197 applied to the accused as the entry and the statement were so blended together that they formed part of the *res gestae*, and could not be separated. A. I. R. 1935 Nag. 52 = 18 N. L. J. 28 = 1935 Cr. C. 270. Sanction was held to be necessary for prosecution for defamation against an Executive Engineer who used defamatory words against the complainant when an application was made to him for a more liberal supply of water for complainant's fields. A. I. R. 1933 Sind 165 = 27 S. L. R. 36 = 34 Cr. L. J. 819 = 144 I. C. 477 = 1933 Cr. C. 529. Where a Sub-Magistrate went with the Receiver appointed by Court and took with him a small police force for preventing a breach of the peace which was apprehended, what he did or is said to have done after reaching the place was done in his official capacity as a Magistrate and in the performance of what he considered his duty as such Magistrate. Even if he exceeded his powers and thereby committed any offence he is entitled to the protection afforded by this section. A. I. R. 1935 M. 319 = 41 M. L. W. 668 = 68 M. L. J. 526 = 1935 Cr. C. 382 = (1935) M. W. N. 590.

6. **Acts held not to be done in discharge of official duty.**—Where a Chairman of a Municipal Board threatened a voter with certain injury if he did not vote for a candidate as desired by the Chairman, the protection of s. 197 could not be invoked. 50 M. 754; 52 M. 695. Where a member of a Municipal Board exercised undue influence on a Sub-overseer of the Board to make him buy bricks from the said member, he would not be protected under this section. 8 Lah. 647. Where a meeting of the District Board was convened for electing a Chairman, and just before the proceedings commenced, certain members presented a written application to the presiding officer containing damaging imputations against one of the candidates and then walked out of the meeting, it was held that the act of the said members was not done either while acting or while purporting to act in the discharge of their official duty. 8 Luck. 156. Where the complaint was that

the police and the patils of a village compelled the petitioner against his will to subscribe to the Taluka Agricultural Association by means of force, abuse and intimidation, it was held that the sanction of Government was not necessary for prosecution under ss. 323, 504 and 506, I. P. C. **A. I. R. 1931 B. 192 = 32 Bom. L. R. 1493 = 130 I. C. 580 = 1931 Cr. C. 225 = 32 Cr. L. J. 575 = 16 A. I. Cr. R. 234.** A member of a Municipal Committee who in his private capacity takes a contract with the Municipal Committee cannot be said to have done so while acting or purporting to act in the discharge of his official duty. **A. I. R. 1932 Nag. 133 = 1932 Cr. C. 669 = 28 N. L. R. 156 = 34 Cr. L. J. 70 = 140 I. C. 711 not following 51 A. 377.** Where the complainant a member of a Village Panchayat having drawn up the proceedings of the election of the Chairman, handed it to the accused, the Village Headman, also a member of the Panchayat, for being forwarded to the Revenue Divisional Officer, and the accused instead of forwarding it, suppressed it and fabricated and forwarded a false document, the accused was not performing any official duty cast on the members of the Panchayat Court, but as Revenue subordinates of the Revenue Divisional Officer and no sanction under s. 197 was necessary. **A. I. R. 1931 M. 492 = (1930) M. W. N. 1109 = 4 M. Cr. C. 30 = 1931 Cr. C. 556 = 133 I. C. 3 = 32 Cr. L. J. 969.** Where the accused, a Sub-divisional Officer of the Public Works Department went to supervise the road work done by the complainant and after inspection assaulted the complainant on finding that one of the banks had collapsed in spite of its having been repaired, it was held that the accused was not acting in the discharge of official duty at the time of the assault and he could not therefore claim the protection of s. 197. **A. I. R. 1935 C. 176 = 39 C. W. N. 238.** Where an organiser of Co-operative Societies was appointed liquidator of a certain Society by the Registrar and he misappropriated certain amounts as such liquidator, no sanction was necessary for his prosecution as his appointment as organiser was independent of his post as liquidator. **A. I. R. 1930 B. 487 = 32 Bom. L. R. 1134 = 129 I. C. 344.** Where the accused sent a false report to the police that his house was burgled and the land revenue collections made by him were stolen, he must be deemed to have made his report either as a private person or as a Village Headman (under s. 45) but not in his capacity of Village Magistrate or Village Munsiff and no sanction under s. 197 was therefore necessary, (1933) **M. W. N. 876. See also (1935) M. W. N. 586.**

III.—SANCTIONING AUTHORITY AND FORM OF SANCTION.

7. **Sanction need not be addressed to any particular officer.**—There is no provision in the section for a sanction to be addressed to any particular officer. A sanction is an order directing the prosecution of a certain person and in the ordinary way that order is conveyed to the authorities who are responsible for initiating prosecutions in the locality in question. **55 A. 798.**

IV.—ABSENCE OF SANCTION.

8.—**Sanction necessary even for taking cognizance.**—This section peremptorily enjoins that no Court can even take cognizance of any alleged offence said to have been committed by a public servant or judge without the previous sanction of the Local Government. Therefore a District Magistrate has no power to direct the complaint to the Sub-divisional Magistrate for inquiry under s. 202 unless he had authority to take cognizance of the offence. **A. I. R. 1931 Oudh 392 = 8 O. W. N. 157 = 132 I. C. 783 = 32 Cr. L. J. 994 = 1934 Cr. C. 824.** When the question of want of sanction is raised, the Magistrate cannot proceed with the case without deciding that question first. (1933) **M. W. N. 1425.**

SECTION 198.

Notes.—1. Taking cognizance of an offence mentioned in the section without a proper complaint is illegal [P. 491, n. 2].—Where the accused was convicted under s. 500, I. P. C. on a complaint by the agent on behalf of his principal who was a woman, but no leave of Court was obtained under the proviso, the conviction was illegal. S. 198 is mandatory and the fact that no objection with regard to jurisdiction was taken in the trial Court cannot confer jurisdiction on the Magistrate who tried the accused. **A. I. R. 1935 Oudh 6 = 11 O. W. N. 1389 = 1934 O. L. R. 878 = 36 Cr. L. J. 116 = 152 I. C. 478 = 1935 Cr. C. 11.**

2. **Who is a person aggrieved of defamation depends upon circumstances [P. 492, n. 5].**—The question whether a person who files a complaint of defamation is or is not aggrieved by the defamation must be decided having regard to the circumstances of each case. The intention of the Legislature is that only such person as has directly or indirectly suffered in his own reputation by the defamation complained of, can set the machinery of the Law Courts in motion. A person cannot file a complaint for defaming the spiritual head of his community, for the complainant is not a person directly aggrieved. **A. I. R. 1934 Sind 188 = 189 I. C. 443 = 1934 Cr. C. 1396; A. I. R. 1935 Sind 95.**

3. Muslim priest not a person aggrieved in respect of marriages among his people.—The hereditary Katheef Levvai (priest) of the Muslims of a particular place, is not a person aggrieved, competent to file a complaint under s. 496, I. P. C. on the ground that it was his duty as Levvai to prevent a marriage prohibited by Mahomedan Law and also because he had been deprived of his fees by the marriage being celebrated in another village. The interest of the Levvai in his community in the matter of marriages among his people is not such as would entitle him to come forward and say that he is aggrieved. The loss of fees is also insufficient and too remote to make him aggrieved. *A. I. R. 1931 M. 247 = (1930) M. W. N. 694 = 3 M. Cr. C. 348 = 1931 Cr. C. 367 = 134 I. C. 57 = 32 Cr. L. J. 1116.*

4. Abetment—complaint under this section necessary.—Where certain persons were charged under s. 114, I. P. C. for abetting an offence under s. 496, I. P. C. and being present when the offence was committed, it was held that a complaint under s. 198, Cr. P. C. was necessary. *A. I. R. 1931 M. 247 = (1930) M. W. N. 694 = 3 M. Cr. C. 348 = 1931 Cr. C. 367 = 134 I. C. 57 = 32 Cr. L. J. 1116.*

SECTION 199.

Notes.—1. **Conviction under ss. 497-498, I. P. C. without a specific complaint as required by this section is illegal** [*P. 494, n. 3*].—Where the husband was not the complainant and no proper reason existed for his not having complained, the conviction of the accused under s. 498, I. P. C. is illegal. *A. I. R. 1933 C. 144 (1) = 34 Cr. L. J. 290 = 142 I. C. 150 = 1933 Cr. C. 205 = 19 A. I. Cr. R. 427; A. I. R. 1934 Lah. 86 = 35 Cr. L. J. 1032 = 149 I. C. 1106 = 1934 Cr. C. 163; A. I. R. 1934 Lah. 122 = 1934 Cr. C. 239 = 153 I. C. 721.* An Appellate Court has no power to alter a conviction, under s. 376, I. P. C. to one under s. 497, I. P. C. when there was no complaint as required by this section. *A. I. R. 1933 Oudh 163 = 10 O. W. N. 107 = 34 Cr. L. J. 496 = 143 I. C. 73 = 1933 Cr. C. 318 = 19 A. I. Cr. R. 156.*

Is it necessary that specific sections should be mentioned in the complaint or is it sufficient if the complaint mentions all the facts? [*P. 494, n. 3 (1)*].—If a petition contains an allegation of facts which, if proved by evidence, would constitute an offence under s. 498, I. P. C., the fact that there are other allegations in the petition which by themselves or in conjunction with those relating to an offence under s. 498 constitute a more serious offence such as one under s. 366 will not make the complaint any the less a complaint under s. 498. The test to be applied is whether if the other allegations like the use of fraud, misappropriation of ornaments and of the woman's age, be eliminated the remaining part of the complaint fulfils the requirements of a "complaint" under s. 498, I. P. C. *A. I. R. 1934 A. 472 = 153 I. C. 697 = 1934 Cr. C. 555.* Similarly, if a complaint described in its heading as one under ss. 366 and 368, I. P. C. fulfils all the requirements of a complaint under s. 497 and clearly makes an accusation of an offence under that section, then if the adultery complained of is proved a conviction under that section will not be illegal on the ground that there has been no complaint as required by this section. *A. I. R. 1934 Lah. 945 = 36 P. L. R. 209 = 1934 Cr. C. 1333.*

Husband appearing as prosecution witness is not a compliance with the section [*P. 494, n. 3 (ii)*].—Where the accused was prosecuted under s. 366-A, I. P. C., they could not be convicted under s. 498, I. P. C. when no complaint of that offence was made by the husband. The mere fact that the husband had come forward to give evidence in the prosecution under s. 366-A, I. P. C. does not cure the defect in procedure. *55 A. 871.*

Adding of a fresh charge under s. 498 at the Sessions trial unwarranted [*N. 3 (vi) at p. 495*].—Section 199 requires that there should be a complaint by the husband followed by the ordinary procedure of inquiry before a Committing Magistrate. Otherwise a charge under this section should not be inquired into or be heard by the Sessions Court. S. 226 does not provide the Sessions Judge with power to add a charge under s. 497 or 498. When the offence originally charged is adultery under s. 366, the only new charges or additions or alterations which may be made are those which can be said to be supported by the evidence which is relevant to the charge already made. Evidence which is relevant to the charge of adultery under s. 497, I. P. C. is totally different to the evidence which is relevant to the charge of abduction under s. 366. The defence to the two charges may be altogether different. *53 C. L. J. 346 = 1931 Cr. C. 676 = 32 Cr. L. J. 1135 = 134 I. C. 314 = A. I. R. 1931 C. 524; A. I. R. 1933 C. 880 = 38 C. W. N. 113 = 34 Cr. L. J. 1092 = 145 I. C. 874 = 1933 Cr. C. 1530.*

2. Person having care of the woman can only complain with the leave of the Court.—If no leave is obtained there is no proper complaint and without such a complaint the Court has no jurisdiction. It is not a mere irregularity which can be cured by s. 537. *A. I. R. 1933 C. 880 = 145 I. C. 874 = 1933 Cr. C. 1530 = 34 Cr. L. J. 1092 = 38 C. W. N. 113.*

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

SECTION 200.

Amendment.—In proviso (b) after the words “thinks fit, and” the words “where the complaint is made in writing” shall be inserted—**Act II of 1926.**

Notes.—1. **Code does not contemplate joint complaint.**—A joint complaint is not contemplated by the Criminal Procedure Code. The duties of a Magistrate under s. 200 make this clear, because he must at once examine the complainant upon oath and it is obvious that it is physically impossible to examine two or more complainants on the same complaint. 35 C. W. N. 782 = 1931 Cr. C. 846 = 134 I. C. 1189 = 33 Cr. L. J. 83 = A. I. R. 1931 C. 646.

2. **Complainant must be examined at once** [P. 499, n. 10]—Where the Magistrate did not examine the complainant completely on the first date, but on a later date examined him once again, the negligence of the Magistrate in not examining the complainant fully on the first day does not amount to an irregularity vitiating the trial. A. I. R. 1933 C. 552 = 37 C. W. N. 319 = 34 Cr. L. J. 1063 = 145 I. C. 700 = 1933 Cr. C. 912 = 20 A. I. Cr. R. 383. Failure to examine the complainant on the back of the complaint under s. 200 is a merely irregularity cured under s. 537 where the accused was in no way prejudiced, he having been examined under s. 244. 56 A. 33. Where the Magistrate took cognizance of an offence under s. 500, I. P. C. without there being a complaint and without the complainant being examined on oath and the defect was pointed out at the earliest opportunity, but was brushed aside, *held* that it was a sufficiently grave irregularity to vitiate the proceedings. A. I. R. 1930 M. 705 = (1930) M. W. N. 413 = 3 M. Cr. C. 243 = 31 Cr. L. J. 895 = 123 I. C. 557 = 1930 Cr. C. 652 = 14 A. I. Cr. R. 511.

SECTION 201.

Note.—A Magistrate need not return the complaint for the reason that though he was entitled to take cognizance of some of the charges named in the complaint he was not entitled to take cognizance of a charge not named in the complaint but which could possibly be made out from the allegations in the complaint. 1930 A. L. J. 1422 = A. I. R. 1931 A. 10 = L. R. 11 A. (Cr.) 187 = 32 Cr. L. J. 360 = 129 I. C. 257 = 1931 Cr. C. 10 = 15 A. I. Cr. R. 25.

SECTION 202.

Amendment.—For the proviso to sub-section (1) the following proviso shall be substituted, namely :—

“Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200”—**Act II of 1926.**

Notes.—1. **Section applies only if Magistrate takes cognizance on complaint** [P. 502, n. 5]—*No power to refer for inquiry application under s. 552.* S. 552 does not deal with a complaint of an “offence” and a District Magistrate has no power to order a preliminary inquiry by a Subordinate Magistrate in cases under that section. A. I. R. 1933 Nag. 374 = 16 N. L. J. 310 = 1933 Cr. C. 1573.

2. **Magistrate must investigate the complaint.**—Where a complaint was made to a police-officer of offences under sections 342 and 363, I. P. C. and on a notice issued by the Magistrate the police-officer admitted the facts but claimed protection under sections 76 and 79, I. P. C. it was not proper for the Magistrate to dismiss the complaint forthwith. It was incumbent on the Magistrate to investigate the complaint and to find out by legal evidence whether the claim for protection under sections 76 and 79, I. P. C. was made out. 55 B. 770. It is not open to a Magistrate to take into consideration the result of an inquest conducted by another Magistrate and treat that inquest report as a report made after an inquiry which is contemplated by this section. A. I. R. 1932 C. 121 = 35 C. W. N. 1082 = 33 Cr. L. J. 218 = 135 I. C. 878 = 1932 Cr. C. 106 = 17 A. I. Cr. R. 388. The person making a complaint need not himself have personal knowledge of the facts constituting the complaint. In such a case before issuing process the Magistrate must satisfy himself on proper materials that :

case for the issue of process has been made out. A. I. R. 1934 Rang. 167 = 36 Cr. L. J. 75 = 152 I. C. 344 = 1934 Cr. C. 784. The nature and extent of investigation necessary for the issue of process is entirely in the discretion of the Magistrate. A. I. R. 1930 Pat. 30 = 10 P. L. T. 618 = 30 Cr. L. J. 554 = 116 I. C. 46 = 1930 Cr. C. 6 = 12 A. I. Cr. R. 427. When there are competing complaints it is manifestly within his discretion on a consideration of the circumstances of the case, to determine in which he should issue process first, *ibid*.

3. Complainant has no right to require the complaint to be referred to police.—The complainant has no rights and privileges under this section to require the Court to refer the case to the police. 59 B. 171.

4. Magistrate must record his reasons for postponing issue of process [P. 503, n. 8]—The omission to record reasons would amount merely to an irregularity, if the procedure adopted by the Magistrate was legal and proper under the circumstances of the case. 55 B. 770; A. I. R. 1931 Sind 113 = 132 I. C. 479 = 1931 Cr. C. 731 = 32 Cr. L. J. 926 = 17 A. I. Cr. R. 35.

5. Magistrate directing inquiry does not deprive himself of jurisdiction.—A Magistrate making an order under this section for preliminary inquiry does not deprive himself of jurisdiction; he merely postpones the issue of process until the report is received but continues to have jurisdiction. He has therefore power under s. 344 to stay the criminal proceedings which were in fact, still pending before him. A. I. R. 1934 Sind 143 = 36 Cr. L. J. 94 = 152 I. C. 382 = 1934 Cr. C. 1150.

6. Magistrate may call upon a Subordinate Magistrate to make inquiry.—A Presidency Magistrate is subordinate to the Chief Presidency Magistrate and to the Additional Chief Presidency Magistrate having the powers of the Chief Presidency Magistrate under s. 18 (4). 61 C. 467.

7. Indiscriminate use of Police agency for investigating complaints not desirable [P. 506, n. 14]—It is not desirable that a Magistrate should refer a complainant to the police or that he should act on the police report without affording the complainant an opportunity of adducing his evidence if he so wishes. The adoption of a different course would foster abuses and defeat the purpose of law. This is more especially the case where the complaint is not only against an ordinary individual but where it is said that he is acting in collusion with a police-officer. A. I. R. 1933 Sind 339 = 27 S. L. R. 387 = 35 Cr. L. J. 24 = 146 I. C. 263 = 1933 Cr. C. 1136; A. I. R. 1933 Sind 395 = 146 I. C. 924 = 1933 Cr. C. 1435.

8. Magistrate directed to make inquiry cannot issue process.—A Subordinate Magistrate who is directed to make an inquiry under this section has only to send a report to the superior Magistrate and it is for the latter to deal with the matter in accordance with law. The Subordinate Magistrate cannot himself issue summonses to the accused. 61 C. 467.

9. Should the accused be allowed to appear during preliminary inquiry? [P. 507, n. 19]—The High Courts have repeatedly condemned the practice of allowing the persons complained against, appearing at the preliminary inquiry, but they do not say it is illegal. It is obvious that there must be cases where some preliminary inquiry is desirable. What is condemned is the rehearsal of a subsequent trial and consequent harassment of parties and waste of public time. A. I. R. 1931 Pat. 302 = 12 P. L. T. 710 = 1931 Cr. C. 723 = 133 I. C. 172 = 32 Cr. L. J. 1023. It is contrary to the scheme of the Code to permit the opposite party to appear and argue that process should not issue. The materials on which the Magistrate is to act are expressly limited by s. 203 to the statement on oath (if any) of the complainant and the result of any investigation or inquiry under s. 202. A. I. R. 1932 C. 697 = 138 I. C. 639 = 36 C. W. N. 674 = 1932 Cr. C. 652 = 33 Cr. L. J. 636; A. I. R. 1934 Rang. 167 = 36 Cr. L. J. 75 = 152 I. C. 344 = 1934 Cr. C. 784; 8 Rang. 1. But in a case where the complainant has asked for and obtained an order for the seizure of the opposite party's books and also an order restraining him from operating on his banking account, the parties can appear immediately and ask that the order be vacated 36 C. W. N. 674 = A. I. R. 1932 C. 697 = 33 Cr. L. J. 636 = 138 I. C. 639 = 1932 Cr. C. 652. It is not illegal for a Magistrate to whom a complaint is referred, to examine or question the person complained against. But this does not mean that the Magistrate could examine the accused, permit him to be represented by lawyers, hear their arguments and then make up his mind which of two rival stories he will accept. 60 C. 1051. If a Magistrate having the duty of making an inquiry under s. 202 can make his inquiry more complete and can inform himself of the facts more fully by having the accused before him in Court, there is no reason why the accused should not be allowed to be present in Court or be called to the inquiry in Court. The Magistrate is not acting illegally in hearing the arguments on behalf of the accused and allowing the accused to put in his written statement. A. I. R. 1934 Oudh 372 = 11 O. W. N. 822 = 1934 O. L. R. 673 = 35 Cr. L. J. 1239 = 151 I. C. 108 = 1934 Cr. C. 1158. But where the Magistrate after examining the complainant under s. 200, instead of issuing process against the accused or proceeding under s. 202 directing a Subordinate Magistrate or the police to

make an inquiry into the allegations, directed that the police should produce the accused before him for the purpose of having an oral inquiry made as to the truth of the complaint, the procedure was held to be quite irregular and illegal. *A. I. R. 1934 Oudh 88 = 11 O. W. N. 34 = 1934 O. L. R. 114 = 147 I. C. 387 = 1934 Cr. C. 258 = 35 Cr. L. J. 415.* It would be highly irregular for a Magistrate to issue notice to an accused person to show cause against the issue of process in an inquiry under this section. It is however open to a Magistrate if he deems it desirable to give an opportunity to the accused to appear and state what he has to say about the accusation and the Magistrate may even accept any documentary evidence the accused cares to produce. *A. I. R. 1934 Sind 143 = 36 Cr. L. J. 94 = 152 I. C. 382 = 1934 Cr. C. 1150.*

10. **Police report part of the record** [*P. 508, n. 21*].—The report of the police under s. 202 is part of the record and there is no reason for refusing a copy. *A. I. R. 1931 M. 429 = (1931) M. W. N. 325 = 33 M. L. W. 570 = 131 I. C. 174 = 1931 Cr. C. 477 = 32 Cr. L. J. 639 = 4 M. Cr. C. 218 = 16 A. I. Cr. R. 328.*

11. **Whether police can investigate under s. 156 in a complaint forwarded under this section.** [See *P. 508, n. 21-A*].—The police need do no more than report. But if they choose to investigate, it is not illegal. *54 M. 598 dissenting from 53 B. 339.* The powers of the police under s. 156 are in no way affected by an order to investigate made under this section. *14 Lah. 194; A. I. R. 1933 Sind 136 = 27 S. L. R. 87 = 34 Cr. L. J. 763 = 144 I. C. 409 = 1933 Cr. C. 334; A. I. R. 1934 Sind 20 = 35 Cr. L. J. 891 = 148 I. C. 985 = 1934 Cr. C. 218.* See note under s. 156.

12. **Can the Magistrate order a charge-sheet to be filed.**—An order calling for a charge-sheet on a report under this section when the police drew up a first information report, is an order under s. 204 and in practice is an order for issue of process. If the Magistrate on a perusal of the police report under this section orders the issue of a warrant for the production of the accused, there is no reason why he cannot achieve the same object by ordering the police to send up the accused for trial. *A. I. R. 1932 Pat. 72 = 12 P. L. T. 937 = 1932 Cr. C. 136 = 136 I. C. 842 = 33 Cr. L. J. 349.*

13. **Magistrate cannot keep accused person in custody.**—When a Magistrate takes cognizance on a complaint he should examine the complainant and take action under s. 202 or if he is taking action on his own knowledge, he should transfer the proceedings completely to the Court of a Subordinate Magistrate. The provisions of the Code do not confer on a Magistrate the powers of a police-officer to investigate and keep an accused person in custody for the purpose of such investigation. It is open to the Magistrate to make a report to the police who could then have taken action under s. 167. *52 A. 457.*

SECTION 203.

Amendment.—For the words “any investigation” the words “the investigation” shall be substituted; and after the word “inquiry” the words and brackets “(if any)” shall be inserted—**Act II of 1926.**

Notes.—1. **Section does not apply to complaints under Acts other than Penal Code.**—A complaint under the Merchant Shipping Act, 1923 must be inquired into in accordance with the provisions of that Act and it cannot be dismissed under the procedure provided in this section. S. 203 is not attracted at all to the application or the disposal of such a complaint. *A. I. R. 1933 C. 647 (1) = 58 C. L. J. 116 = 37 C. W. N. 1185 = 35 Cr. L. J. 25 = 146 I. C. 333 = 1933 Cr. C. 1087.*

DUTY OF MAGISTRATES BEFORE DISMISSAL.

Complainant need not be examined once again under this section [See *p. 510, n. 8*].—If the complainant has been examined under s. 200, it appears from the use of the words “if any” in this section that there is no necessity for the Magistrate to examine him on oath under this section unless he considers it desirable to do so. *A. I. R. 1932 Sind 58 = 25 S. L. R. 468 = 1932 Cr. C. 199 = 33 Cr. L. J. 330 = 136 I. C. 767.*

REASONS FOR DISMISSAL.

3. **What are not proper grounds for dismissal** [*P. 512, n. 18*].—*Bad motive of complainant, not legal ground for dismissal* [*n. 18 (iii)*].—The motive of the complainant is no ground for the dismissal of a complaint. What the Magistrate has to consider is whether there is *prima facie* evidence of a criminal offence which in his judgment calls upon the alleged offender to answer. *A. I. R. 1934 Nag. 135 = 35 Cr. L. J. 1215 = 150 I. C. 1120 = 1934 Cr. C. 868.*

Death of complainant [*n. 18 (xii)*].—There is no abatement of a criminal case on the death of the complainant. *54 M. 793.*

INCIDENTAL ORDERS THAT MAY BE PASSED ON DISMISSAL OF COMPLAINT.

4. Is a Court dismissing a complaint competent to pass any order as to disposal of property? [*P. 513, n. 23*].—A company let out a motor lorry on hire-purchase terms. Owing to the alleged breach by the hirer of the provisions of the contract between the parties, they forcibly took possession of the lorry. The hirer filed a complaint before the Magistrate who finally dismissed the complaint under this section but directed the lorry to be delivered to the complainant. It was held that the dispute being of a civil nature, it was competent for the Magistrate to order the resumption of *status quo* till the determination of the rights of the parties in a Civil Court. The language of the section is wide enough to cover such orders and there was no lack of jurisdiction in the Magistrate. *A. I. R. 1933 C. 149 = 1933 Cr. C. 226 = 144 I. C. 78 = 34 Cr. L. J. 676.*

COMPETENCY OF COURTS TO ENTERTAIN COMPLAINTS ONCE DISMISSED.

5. Complaint once dismissed can be entertained by the same or different Magistrate [*P. 514, n. 26*].—Section 403 ends with an explanation that the dismissal of a complaint is not an acquittal for the purposes of that section. An acquittal to be a bar to a second trial must still remain in force. It is not stated that the order of dismissal of a complaint is a bar until it is set aside. The only meaning of the explanation is that an order dismissing a complaint is not an acquittal in the sense that it bars a further inquiry until it has been set aside. Following the ruling in *29 M. 126 (F. B.)* there appears to be no difference in principle between the entertainment of a second complaint by the same or by a different Magistrate. *55 M. 622 (F. B.)*; *12 Lah. 9*. But see *A. I. R. 1929 Sind 61 (1) = 23 S. L. R. 43 = 29 Cr. L. J. 1097 = 112 I. C. 681 = 11 A. I. Cr. R. 366*. When once a complaint is dismissed under s. 203 it is open to the complainant to file another complaint specifying the same offence or another offence arising out of the same facts. *A. I. R. 1934 Rang. 40 = 35 Cr. L. J. 802 = 148 I. C. 845 = 1934 Cr. C. 263*. The case is much stronger when the second complaint is filed by a different individual. *A. I. R. 1934 Lah. 435 = 36 Cr. L. J. 62 = 152 I. C. 155 = 1934 Cr. C. 698.*

See note 17 to s. 403.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

SECTION 204.

Notes.—1. Section applies whether cognizance is taken on complaint or on police report.—A Magistrate empowered under s. 190 (a) and (b) can issue his process for compelling the appearance of the accused on a perusal of the police report submitted to him under s. 173 even when the case is declared to be false. He can also do the same on perusal of the police report submitted to him after an inquiry under s. 202 in case of a complaint. In both the cases he will be acting under this section, the only section authorising the Magistrate in any case to proceed against the accused. *A. I. R. 1932 Pat. 72 = 12 P. L. T. 937 = 1932 Cr. C. 136 = 136 I. C. 842 = 33 Cr. L. J. 349.*

2. Issue of process discretionary [*P. 517, See n. 5*].—The Magistrate is not bound to issue process even if the evidence discloses a *prima facie* case. There is a discretion left in the hands of the Magistrate who may for good reasons refuse to issue process. *A. I. R. 1931 C. 607 = 54 C. L. J. 253 = 36 C. W. N. 16 = 134 I. C. 1045 = 33 Cr. L. J. 3 = 1931 Cr. C. 759.*

3. Complainant should not be directed to accompany process server.—It is not a complainant's duty in a criminal proceeding to accompany the Court process server to secure service of summons upon the accused or respondent. *A. I. R. 1933 Lah. 720 = 1933 Cr. C. 941 = 147 I. C. 675.*

4. Process fees—Complaint cannot be dismissed under sub-section (3) after charge is framed.—In a warrant case, after the charge is framed, the complainant cannot be ordered to pay process fees for the attendance of witnesses whom the accused wanted to cross-examine and the complaint could not be dismissed in default of such payment of process fee. (1933) *M. W. N. 1266.*

5. Revision—High Court competent to suspend proceedings [*P. 518, n. 18*].—The Magistrate can take cognizance of an offence only in one of three ways: (1) On a complaint; (2) on a police report or (3) on his own information. Therefore there must be some material before the Magistrate showing that the accused has committed the offence. If the accused is being prosecuted without sufficient materials, the High Court can interfere to stop the patent injustice. *A. I. R. 1932 Pat. 72 = 12 P. L. T. 937 = 1932 Cr. C. 136 = 136 I. C. 842 = 33 Cr. L. J. 349.*

See note 11 to s. 439.

SECTION 205.

Notes.—1. The Magistrate is not entitled to insist on the personal appearance of the accused before dealing with her application under sub-sec. (1). 1934 M. W. N. 696.

2. Whether section applies when warrant is issued [P. 519, n. 6 and n. 7]—This section applies to all cases where a summons is issued in the first instance to an accused, irrespective of the fact whether he appears in answer to the summons or has to be brought in by a warrant of arrest issued subsequently. 26 N. L. R. 50 = 12 N. L. J. 180 = A. I. R. 1930 Nag. 61 = 31 Cr. L. J. 284 = 121 I. C. 651 = 1930 Cr. C. 149 = 13 A. I. Cr. R. 420.

3. When personal attendance is dispensed with accused need not be questioned under s. 342.—Where the Magistrate exercises his power under this section and dispenses with the personal attendance of the accused and permits him to appear by his pleader, the Magistrate is not bound to question the accused personally. S. 342 must be read subject to the provisions of s. 205. A. I. R. 1934 B. 212 = 36 Bom. L. R. 433 = 35 Cr. L. J. 1035 = 149 I. C. 1132 = 1934 Cr. C. 759. A contrary view was taken by the Allahabad High Court in 1934 A. L. J. 753. There it was held that the language used in s. 342, was compulsory and the words "question him" in sub-sec. (1) of that section did not permit a statement to be made by the Advocate in place of the statement to be made by the accused. The Legislature intended that the statement should be a personal statement of the accused. It is therefore proper to compel the accused to be present personally to make an explanation under s. 342. 1934 A. L. J. 753 = A. I. R. 1934 A. 693 (2) = 3 A. W. R. 443 = 1934 A. L. R. 542 = 35 Cr. L. J. 879 = 148 I. C. 1135 = 1934 Cr. C. 866.

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

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SECTION 207.

Notes.—1. The procedure under this chapter "shall be adopted" [P. 522, n. 1]—Failure of the Magistrate to hold an inquiry under this chapter would be to the prejudice of the accused. Failure to observe the provisions of this chapter will render the commitment illegal. A. I. R. 1932 C. 683 = 36 C. W. N. 926 = 1932 Cr. C. 636 = 139 I. C. 470 = 33 Cr. L. J. 770.

2. When a case should be committed to the Court of Session.—See note 3 to s. 209.

SECTION 208.

Notes.—1. Whether Magistrate is bound to record all the evidence available [P. 524, n. 8]—Sections 208 and 210 do not mean that even though a *prima facie* case is made out against the accused the Magistrate is still bound to record all the remaining evidence for the prosecution. Nor does it mean that if the Magistrate after hearing part of the evidence of the accused is satisfied that there is no case for commitment, he should nevertheless proceed to record the entire evidence for the accused. The prosecution can place before the Court all the evidence on which they wish to rely and after evidence sufficient to make out a *prima facie* case has been taken, it is not necessary to call further evidence. Notice of all the evidence to be produced at the Sessions ought however to be given to the accused at the trial. Otherwise he would be prejudiced. 55 A. 1040; A. I. R. 1930 Sind 99 = 24 S. L. R. 96 = 31 Cr. L. J. 117 = 120 I. C. 520 = 1930 Cr. C. 282 = 13 A. I. Cr. R. 266. When a witness not examined in the committing Magistrate's Court is examined in the Sessions Court, copies of the proofs only, or at least a summary of the evidence, which the witness is expected to give, should be furnished by the prosecution within a reasonable time to the accused free of cost. A. I. R. 1934 B. 487 = 36 Bom. L. R. 950 = 153 I. C. 278 = 1934 Cr. C. 1413.

It was however held by the Lahore High Court that the committal of the accused to the Sessions without examining all the evidence that the prosecution meant to produce in the case, was against the provisions of Ch. XVIII and therefore the commitment was bad in law. 15 Lah. 331. There is no justification for abstaining from examining in the committal Magistrate's Court, the principal witnesses for the prosecution. A. I. R. 1935 Sind 31 = 1935 Cr. C. 160 = 28 S. L. R. 317 = 154 I. C. 455.

2. Magistrate's duty to take evidence for the defence [*P. 524, n. 9*].—The accused is entitled under this section to have his witnesses examined whether or not such examination will help him. The section is mandatory in this respect and failure to examine the defence witnesses will justify the commitment being quashed. *A. I. R. 1934 Lah. 610 (1) = 35 P. L. R. 612 = 153 I. C. 436 = 1934 Cr. C. 942; 57 C. 945.*

3. Examination of complainant not obligatory.—Under sub-sec. (1) it is not the examination of the complainant that is necessary, but only that he shall be heard. *A. I. R. 1929 C. 229 = 118 I. C. 572 = 30 Cr. L. J. 942.*

4. Magistrate bound to issue process [See *P. 524, n. 10*].—The Magistrate is bound under this section to take steps for the production of the documents wanted by the accused unless he deemed it unnecessary to do so. *A. I. R. 1933 C. 184 = 34 Cr. L. J. 868 = 144 I. C. 930 = 1933 Cr. C. 230 = 20 A. I. Cr. R. 341.*

5. Right to cross-examine [*P. 524, n. 11*].—It is a clear right of the parties to cross-examine prosecution witnesses before the committing Court makes up its mind as to whether there is a case to be committed. *57 C. 945.*

SECTION 209.

Notes.—1. Whether examination of accused before committal is imperative [See *P. 525, n. 1*].—S. 342 does not apply to the inquiry preliminary to commitment, as the stage at which the accused is called upon for his defence is not reached in the committing Court. Omission to examine the accused in the committing Court is not therefore illegal. *39 C. W. N. 289 dissenting from 23 M. 636.*

2. Duty of Magistrate in dealing with the evidence adduced before him [*P. 530, n. 22*].—Under this section the Magistrate has got to consider the evidence, both its nature and credibility. But he has not got to satisfy himself that there is a proper case for convicting the accused. If he comes to the conclusion that there is evidence to be weighed, he ought to commit the accused for trial and he ought not to discharge the accused merely because he thinks that if he were to try the accused he would not be prepared to convict the accused on the evidence before him. But if he comes to the conclusion that the evidence for the prosecution is such that no tribunal could be expected to convict the accused, then he ought to discharge him. All that the Magistrate has to see is whether there is a *prima facie* case on which the accused can be put on his trial. *59 B. 125 (F. B.)* It is not for the Magistrate to weigh the evidence or to give the accused the benefit of doubt. If he finds that there is sufficient evidence, then he should commit the case to the Court of Session. *A. I. R. 1935 A. 366.* If the Magistrate without rejecting the evidence as totally untrustworthy and the charge as groundless, interpreted the evidence, and gave it a legal complexion, he exceeded his jurisdiction and usurped the function of the trial Court. *49 A. 443.* Where however the Magistrate has only given reasons for holding that the alleged eye witnesses were not to be believed and that no Court could convict the accused on such flimsy, tainted, hostile, unnatural and inconsistent evidence, it cannot be said that he discharged the accused without rejecting the evidence as totally untrustworthy and the charge as groundless, and if he has given reasons for disbelieving the prosecution witnesses, it is not because he has interpreted the evidence but because he has found that circumstances exist which made the evidence unreliable. *A. I. R. 1933 A. 432 (2) = 1933 A. L. J. 1115 = L. R. 14 A. (Cr.) 220 = 34 Cr. L. J. 1201 = 146 I. C. 160 = 1933 Cr. C. 827 = 20 A. I. Cr. R. 106.*

3. When a case should be committed to the Court of Session [See *P. 532, notes 24-26*].—The Magistrate should try the case himself if it is within his cognizance and the offence in the circumstances disclosed in the depositions appears to be a trivial one. On the other hand, a Magistrate ought not to take upon himself the responsibility of trying a case which, taking a reasonable view of the effect of the depositions, must be regarded as involving a grave offence or one in which complicated or difficult questions of law or fact arise. The function of a Magistrate is to dispose of petty cases and he ought to commit to Sessions, cases of a complicated or serious nature which he is neither by training nor experience qualified to try. *10 Rang. 495.* Where the offence is triable under Sch. II by the Magistrate as well as by the Court of Session, the Magistrate has a discretion to decide in what way the case shall be tried. No doubt, that discretion must be exercised in a judicial manner. The Magistrate must have regard to the importance of the case, the maximum penalty for the offence, the benefit to the accused of trial by jury or with the aid of assessors in the Court of Session, etc. No doubt his discretion is subject to review by the High Court, but the High Court, will only do so on certain definite grounds. *56 B. 61.* Where the trial by the Magistrate of the offences triable by him would have the result of unnecessarily delaying the proceedings in the Court of Session in respect of the graver offences, the committal by the Magistrate in respect of all the offences would be justified. *A. I. R. 1933 Lah. 500 = 34 P. L. R. 360 = 34 Cr. L. J. 814 = 142 I. C. 200 = 1933 Cr. C. 760.*

SECTION 211.

Notes.—1. Accused is entitled to have the witnesses named in the list summoned [P. 534, n. 1].—When the accused has filed a list of his witnesses under this section, he is entitled as of right to have the witnesses therein mentioned summoned, in the absence of a finding that they or any of them were included in the list for the purpose of vexation or delay or of defeating the ends of justice. **A. I. R. 1935 Sind 69 = 1935 Cr. C. 274.** It is incumbent on the accused to put in his list of defence witnesses at once. If he does not do so, the Magistrate will have a discretion to allow or not to allow an application made at a later date. If such an application is made and is allowed, then the application whether under sub-section (1) or (2) is governed by the same principle and the accused is entitled to have the attendance of the witnesses enforced. Failure to enforce such attendance, however, when not prejudicial to the accused does not vitiate the conviction. **A. I. R. 1930 C. 188 = 31 Cr. L. J. 695 = 124 I. C. 513 = 1930 Cr. C. 145.**

2. Duty of Magistrate to inform the accused of the necessity of giving his list of witnesses [P. 535, n. 2].—The Magistrate should inform the accused of his right to give his list of witnesses and of the necessity of giving in such list. **A. I. R. 1934 Lah. 23 (1) = 35 P. L. R. 312 = 35 Cr. L. J. 616 = 148 I. C. 159 = 1934 Cr. C. 32.**

SECTION 215.

Notes.—1. Insufficiency of evidence, how far a ground for quashing commitment [P. 539, n. 8].—Absence or insufficiency of evidence, does not justify a commitment being quashed. **A. I. R. 1931 Lah. 467 = 32 P. L. R. 581 = 132 I. C. 380 = 1931 Cr. C. 691 = 32 Cr. L. J. 867.** In the above decision **A. I. R. 1930 Lah. 545 (1) = 31 P. L. R. 348 = 31 Cr. L. J. 814 = 125 I. C. 324 = 1930 Cr. C. 592** in which a contrary view was taken was *not followed*. In dealing with an application under this section the High Court is not required to appreciate the evidence. All that the High Court is required to apply its mind to is, assuming that the facts are proved, do they justify the conviction of the accused or not? As so stated, the point is one of law, pure and simple. This section was intended *inter alia* to empower the High Court to quash a committal to a Court of Session, in all cases in which a Judge of the High Court trying Sessions cases would stay proceedings under s. 273. **A. I. R. 1932 Sind 157 = 1932 Cr. C. 693 = 26 S. L. R. 407 = 34 Cr. L. J. 14 = 140 I. C. 485.**

2. That the case is triable by the Magistrate, whether a ground for quashing commitment [P. 539, n. 9].—Where there was a case and a counter-case one of which was triable by the Magistrate and the other by the Sessions and the Magistrate convicted the accused in one case and committed the other case to the Sessions, it was held in **2 M. Cr. C. 238** that there was nothing to prevent the Magistrate from committing the case under s. 347 and that both the cases should, if practicable, be tried by the same Court. But it is not an absolute rule of law that charges and counter-charges must be tried by the same Court. **A. I. R. 1932 M. 502 = (1932) M. W. N. 634 = 1932 Cr. C. 506 = 5 M. Cr. C. 197 = 63 M. L. J. 101 = 36 M. L. W. 390 = 139 I. C. 343 = 33 Cr. L. J. 765; (1934) M. W. N. 272 (1).** Where a case triable by the Magistrate is committed to the Sessions on the ground of convenience, when such ground ceases to exist, there is sufficient reason to quash the commitment. **A. I. R. 1934 Lah. 95 = 35 P. L. R. 300 = 151 I. C. 970 = 35 Cr. L. J. 1469 = 1934 Cr. C. 174.** In committing cases not exclusively triable by the Court of Session Magistrates should exercise a proper discretion and give adequate reasons for the committal. If no adequate reason is given, the commitment may be quashed. A case triable by a Magistrate should not be committed merely to avoid a possible conflict of decisions, but the proper course is to await the result of the Sessions trial. **A. I. R. 1930 Lah. 312 = 31 Cr. L. J. 178 = 120 I. C. 677 = 1930 Cr. C. 344 = 13 A. I. Cr. R. 280.** An apparent connection of a case under s. 326, I. P. C. with a case under s. 302, I. P. C. is no ground for committing it to the Sessions, when the offence involved can be tried by the Magistrate. **A. I. R. 1932 Lah. 163 = 32 P. L. R. 856 = 1932 Cr. C. 154 = 33 Cr. L. J. 255 = 136 I. C. 267 = 17 A. I. Cr. R. 365.** An unnecessary committal is an error of law which would justify the quashing of the commitment. **A. I. R. 1932 Lah. 263 = 33 P. L. R. 185 = 1932 Cr. C. 328 = 138 I. C. 701 = 33 Cr. L. J. 680.** Where the case was triable by the Sessions Court the mere fact that the committing Magistrate did not give reasons for committing the case when there was a Magistrate with enhanced powers under s. 80 in the District, cannot make the commitment illegal. **A. I. R. 1934 Lah. 326 (2) = 36 P. L. R. 218 = 150 I. C. 769 = 1934 Cr. C. 557.** See note 3 to s. 209.

3. Grounds held sufficient to quash a commitment. Commitment on evidence recorded in the absence of the accused [P. 541, n. 10 (vii)].—Two accused were charged and tried separately for offences under ss. 409 and 477-A, I. P. C. The Sessions Judge considered that they should have been charged under s. 120-B read with

ss. 409 and 477-A, I. P. C. and ordered them to be committed. The accused did not want to cross-examine the witnesses after the amended charge. It was held that the accused cannot be committed by simply framing an amended charge, because the evidence against each of them had been given in the absence of the other. 68 M. L. J. 330 = 41 M. L. W. 704 = (1934) M. W. N. 1095.

4. **What are not proper grounds for quashing a commitment** [P. 541, n. 11]—Where all the material witnesses in two dacoity cases were examined separately but the evidence in one case of certain formal witnesses consisted of carbon copies of their evidence in the other case, it was held that it was not necessary that all the witnesses should be produced before the committing Magistrate and that the defect in this case can be rectified by the Sessions Judge by calling them as witnesses and there was therefore no ground for quashing the commitment. A. I. R. 1935 Oudh 9 (1) = 11 O. W. N. 1308 = 1934 O. L. R. 855 = 36 Cr. L. J. 175 = 152 I. C. 428 = 1935 Cr. C. 17.

5. **Order quashing commitment if amounts to discharge** [P. 542, n. 15]—The section empowers the High Court to quash an order of commitment on a point of law, but it does not in any way restrict the power of the High Court to pass any subsequent order after the commitment is quashed. The matter could be sent back to the Magistrate who would conclude the trial before him. The Magistrate will then see whether on the complaint and on the evidence the accused would be guilty of any other offence and try him accordingly. A. I. R. 1933 B. 494 = 35 Bom. L. R. 1062 = 1933 Cr. C. 1598 = 147 I. C. 879.

CHAPTER XIX.

OF THE CHARGE.

SECTION 221.

Notes.—1. Charge under I. P. C. how drawn up [P. 547, n. 4]—S. 366, I. P. C.—When the accused is charged with kidnapping and abduction, separate charges for each of the offences is necessary. A single charge under s. 366 is defective in law. A. I. R. 1933 C. 563 = 144 I. C. 93 = 34 Cr. L. J. 682 = 1933 Cr. C. 940. It should appear plain whether the accused persons are being charged with kidnapping or are being charged with abduction and whether the intent alleged was to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the girl would be forced or seduced to illicit intercourse. A. I. R. 1933 C. 194 = 1933 Cr. C. 245 = 145 I. C. 925 = 34 Cr. L. J. 1107; A. I. R. 1934 Pat. 170 = 15 P. L. T. 229 = 35 Cr. L. J. 814 = 148 I. C. 791 = 1934 Cr. C. 367. The ingredients of the two offences of kidnapping and abduction are different, and particulars must always be given sufficient to give the accused notice of the matter with which he is charged. 60 C. 1394; A. I. R. 1927 C. 644 = 45 C. L. J. 561 = 31 C. W. N. 940 = 104 I. C. 245 = 28 Cr. L. J. 805; A. I. R. 1934 C. 85 = 37 C. W. N. 1071 = 35 Cr. L. J. 487 = 147 I. C. 828 = 1934 Cr. C. 50. S. 304, I. P. C.—In a charge under s. 304, I. P. C. which is divided into two distinct parts, so much of the definition of the offence should be stated as to give the accused clear notice of the exact matter with which he is charged. A. I. R. 1935 Sind 23 = 28 S. L. R. 295 = 154 I. C. 138 = 1935 Cr. C. 118. S. 124-A, I. P. C.—Where the charge merely stated that on particular dates the accused delivered “seditious speeches and brought or attempted to bring into hatred or contempt,” etc., it was held that the charge was certainly defective, but having regard to the simple nature of the allegations made by the prosecution as to the substance of the speeches in the particular case, the accused was not under any misapprehension as to the nature of the charge against him. A. I. R. 1931 Lah. 186 = 32 P. L. R. 13 = 1931 Gr. C. 306 = 32 Cr. L. J. 1202 = 134 I. C. 580.

2. **Sub-section (7). When particulars of previous conviction should be stated** [P. 549, n. 18]—Where the sentence intended to be awarded is one within the limits laid down for the offence and the same is within the competence of the Court to award, the provisions of s. 75, I. P. C. providing for enhanced punishment are not brought into force and consequently this sub-section has no application. Failure to state the facts of previous conviction is not an irregularity in such cases. A. I. R. 1933 Nag. 315 = 29 N. L. R. 309 = 34 Cr. L. J. 1166 = 146 I. C. 15 = 1933 Cr. C. 1313.

SECTION 222.

Notes.—1. Charge must mention time, place, person and circumstances of the offence [*P. 549, n. 1*].—In a charge of conspiracy, the names of fellow-conspirators need not be given. Where the accused knew full well who his fellow-conspirators were, it cannot be contended that he suffered any prejudice from the fact that their names were not mentioned in the charge. *A. I. R. 1933 A. 498 = 1933 Cr. C. 833*. When the accused is charged with kidnapping or abduction, it is not sufficient merely to charge the accused in the bare words of the section of the Penal Code. Particulars must always be given sufficient to give him notice of the matter with which he is charged. *60 G. 1394*. But the omission to give particulars in the charge will be cured by *s. 537* unless the defect has occasioned a failure of justice, *ibid*.

2. Scope of sub-section (2) [*P. 550, n. 6*].—Sub-section (2) is only an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the sake of convenience. It is nowhere prescribed that if an accused has misappropriated several sums within a year, they all should be added together and made into one gross sum and tried as one charge. *A. I. R. 1930 M. 978 = (1930) M. W. N. 1097 = 32 M. L. W. 789 = 59 M. L. J. 854 = 4 M. Cr. C. 17 = 32 Cr. L. J. 223 = 129 I. C. 75 = 1930 Cr. C. 1194*. Where three accused were jointly charged, one with misappropriation of a sum of money, another, in respect of a part of the same amount and the third with abetment thereof the case did not fall within sub-section (2) and there was a misjoinder of charges. *8 Rang. 632*.

3. Charge need only mention the aggregate sum without enumerating the particular items [*P. 550, n. 9*].—Sub-section (2) was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum. *6 Luck. 435*.

4. Charge framed under cl. (2) constitutes only one offence within the meaning of s. 234 [*P. 551, n. 10*].—Where the charge specified the dates upon which the sums were alleged to have been embezzled and the time included between the first and the last of such dates was within one year, the charge was correctly drawn up in accordance with the provisions of *s. 222 (2)* and it must be deemed to be a charge of one offence within the meaning of *s. 234*. *52 A. 941*.

5. Time between first and last dates not to exceed one year [*P. 551, n. 12*].—Where the charge did not specify the first and last dates during which the misappropriation took place and it was possible that the period could have exceeded one year, there was no proper compliance with the provisions of this section and the conviction was set aside. *A. I. R. 1934 Pat. 132 = 15 P. L. T. 647 = 35 Cr. L. J. 693 = 148 I. C. 519 = 1934 Cr. C. 288*. Where the period exceeds one year and the accused is thereby prejudiced in his defence, *s. 537* will not cure the irregularity. *A. I. R. 1935 Oudh 241 = 1935 O. W. N. 126 = 1935 O. L. R. 141 = 154 I. C. 258*.

SECTION 223.

Notes.—1. Particulars in charges of unlawful assembly, rioting and under s. 149, I. P. C. [*P. 552, n. 1*].—In charges under *s. 149, I. P. C.* it is very desirable that the common object should be mentioned so as to give the accused clear notice of the charge against them, but the omission to do so is nothing more than a mere irregularity. *8 Luck. 199*.

2. Particulars in a charge of conspiracy [*P. 555, n. 9*].—It would be unreasonable to require the Crown to establish with accuracy when the conspiracy began or ended. There is therefore no objection to approximate dates being entered in the charge. It is also sufficient to allege the object of the accused as being to defraud the public by deceitful means without specifying the persons defrauded. *A. I. R. 1934 Sind 57 = 23 S. L. R. 119 = 151 I. C. 494 = 1934 Cr. C. 628 = 35 Cr. L. J. 1337*.

SECTION 225.

Note.—Omission to state exact words used in a charge under s. 500, I. P. C. for defamation.—Although the exact words used are not given in the charge, if the charge is clear and there is no ambiguity and the accused has not been misled in any way, the omission is not material. *A. I. R. 1932 Nag. 158 = 1932 Cr. C. 863 = 141 I. C. 438 = 34 Cr. L. J. 154*.

SECTION 226.

Notes.—1. Power of Sessions Judge to add charge at any stage [*P. 558, n. 4*].—When the evidence recorded by the Magistrate disclosed a different offence, the Sessions Judge was justified in framing a charge under the appropriate section despite the fact that the committing Magistrate did not believe that evidence. *A. I. R. 1933 Oudh 375 = 10 O. W. N. 738 = 35 Cr. L. J. 63 = 146 I. C. 424 = 1933 Cr. C. 1092.*

2. Power limited to charge imperfect or erroneous at the time of commitment [*P. 558, See n. 4 (a)*].—For this section to apply, the charge must be imperfect or erroneous at the time of commitment. S. 219 provides for the taking of supplementary evidence after commitment but before the trial and there is no provision that the charge can be altered or a fresh committal order made by the Magistrate of his own motion after the taking of such evidence. *65 M. L. J. 6 = 38 M. L. W. 668 = (1932) M. W. N. 1162 = A. I. R. 1933 M. 247 = 5 M. Cr. C. 373 = 142 I. C. 138 = 34 Cr. L. J. 278 = 1933 Cr. C. 374.*

SECTION 227.

Court may alter charge at any time before judgment [*P. 560, See n. 3*].—The Court may alter a charge at any time before judgment is pronounced, but of course, if in certain circumstances such alteration has occasioned a failure of justice, the Appellate or Revisional Court may interfere. The discretion conferred on the Courts by s. 227 cannot be whittled away by rulings. *A. I. R. 1931 M. 439 = (1931) M. W. N. 399 = 131 I. C. 461 = 1931 Cr. C. 487 = 32 Cr. L. J. 756 = 4 M. Cr. C. 323 = 16 A. I. Cr. R. 419.*

SECTION 231.

Note.—The section is mandatory [*P. 562, Note*].—Where after the conclusion of the case and before delivery of judgment the Magistrate made an alteration in the charge, but rejected the application of the accused to cross-examine certain witnesses on the ground that the alteration of the charge was in no way material and that the objection by the accused was absolutely frivolous, it was held that it was a violation of the mandatory terms of this section and as such vitiated the trial. *55 C. L. J. 111 = 36 C. W. N. 542 = 136 I. C. 136 = 33 Cr. L. J. 265 = 1932 Cr. C. 478 = A. I. R. 1932 C. 436.* But as compared with s. 256, there is no duty laid on the Court under this section to inquire of the accused whether they would recall previous witnesses or summon new ones. To make the provisions of this section applicable there must be some evidence that the Court refused the request of the complainant or the accused to recall or summon witnesses. *52 A. 455.* Even if the Magistrate should decide to proceed with the trial immediately under s. 228, the accused has the right to recall prosecution witnesses under this section. *52 M. 346.*

SECTION 233.

SEPARATE CHARGES FOR EACH DISTINCT OFFENCE.

Notes.—1. Separate charges ought not to be lumped together in a single charge [*P. 564, n. 7*].—A single charge of forgery in respect of the whole book specifying three particulars of forgery in it, offends against the provisions of this section as there should have been a separate charge with regard to each item. But that would not be an adequate ground for disturbing the conviction if the accused was not misled by the error or unless it had occasioned a failure of justice. *59 C. 1233.* Where the accused forged two withdrawal cheques on different dates and drew money from the Bank, each withdrawal was a distinct offence and there ought to have been two charges or one charge with two heads. *A. I. R. 1933 Pat. 488 = 14 P. L. T. 580 = 34 Cr. L. J. 892 = 144 I. C. 936 = 1933 Cr. C. 1030.*

JOINDER OF CHARGES.

2. What are distinct offences that cannot be tried together [*P. 567, n. 14*].—(a) *Ss. 409 and 477-A, I. P. C.*—Where the accused, an overseer was alleged to have entered the name of a private person in the muster-rolls as a person entitled to the wages and paid the wages to him though in fact he was his private servant, and was charged with offences under ss. 409 and 477-A, I. P. C. it was held that the offences being distinct could not be combined for the purpose of trial. Every payment was a distinct offence under s. 405 I. P. C. Every act of falsifying the muster-rolls was a distinct offence in itself. The case did not fall under any of the exceptions, contained in ss. 234 and 235. *6 Luck. 441; (1934) M. W. N. 1094.*

(b) *Charge under s. 471/465, I. P. C. in respect of more than one forgery in one book.*—It is improper to frame a charge under s. 471/465, I. P. C. in respect of the whole book specifying three particulars of forgery in it. There should be a separate charge with regard to each. 59 C. 1233.

(c) *Offences under s. 380 and s. 457, I. P. C.*—A. I. R. 1932 B. 277 = 34 Bom. L. R. 590 = 33 Cr. L. J. 619 = 138 I. C. 520 = 1932 Cr. C. 389 = 18 A. I. Cr. R. 372.

(d) *Charges of kidnapping and abduction.*—Kidnapping and abduction are two distinct offences and should not be joined together. 60 C. 1394. But where the defence was not misled and no failure of justice followed, the irregularity will be condoned under s. 537. A. I. R. 1934 Sind 164 = 152 I. C. 1061 = 1934 Cr. C. 1266.

(e) *Charges under ss. 170 and 175, I. P. C.*—A. I. R. 1933 M. 434 (1) = 1933 M. Cr. C. 187 = 34 Cr. L. J. 1183 = 146 I. C. 195 = 1933 Cr. C. 662.

(f) *Distinct charges comprising offences under cl. (a) (iii) and cl. (b) (ii)—S. 103, Presidency Towns Insolvency Act.*—36 Bom. L. R. 639 = A. I. R. 1934 B. 303 = 35 Cr. L. J. 1477 = 151 I. C. 934 = 1934 Cr. C. 1036.

(g) *Offences under s. 19 (d), Arms Act and s. 411, I. P. C.*—A. I. R. 1934 Oudh 457 = 11 O. W. N. 1206 = 1934 O. L. R. 777 = 35 Cr. L. J. 1417 = 151 I. C. 840 = 1934 Cr. C. 1308.

(h) The offences of being the author, editor, printer and publisher of an offending article under s. 3, Indian States Protection against Disaffection Act, are distinct offences and cannot be consolidated together for the purpose of holding a joint trial. The act of editing and printing it at a certain place and publishing the same at six different places on different occasions cannot be regarded as part of the same transaction within the meaning of s. 235. A. I. R. 1935 Nag. 90.

3. *Charges that can be tried together.*—*Charges under ss. 302 and 201, I. P. C.*—There is no misjoinder of charges if the accused are tried under ss. 302 and 201, I. P. C. When the evidence is insufficient to convict the accused of murder and they are acquitted, the presumption is that they are not guilty of murder at all. There is therefore no difficulty in convicting them under s. 201, I. P. C. if there is evidence as to their being seen with the dead body of the deceased. A. I. R. 1932 A. 71 = 1932 Cr. C. 91 = 33 Cr. L. J. 283 = 136 I. C. 376 = L. R. 12 A. (Cr.) 164 = 16 A. I. Cr. R. 474 following 49 A. 57 and 6 Lah. 226 (P. C.); 59 C. 1040; 1932 A. L. J. 801.

EFFECT OF MISJOINDER.

4. *Joint trial of distinct offences not falling within the exceptions, illegal* [P. 570, n. 20]—A misjoinder of charges between which there is no connection whatever is fatal to the prosecution despite anything that may be contained in s. 537. A. I. R. 1931 A. 705 = 1931 A. L. J. 690 = L. R. 12 A. (Cr.) 95 = 32 Cr. L. J. 1031 = 133 I. C. 418 = 16 A. I. Cr. R. 53 = 1931 Cr. C. 1041; A. I. R. 1932 B. 277 = 34 Bom. L. R. 590 = 33 Cr. L. J. 619 = 138 I. C. 520 = 1932 Cr. C. 389 = 18 A. I. Cr. R. 372; 6 Luck. 441; 8 Rang. 632; A. I. R. 1930 Sind 62 = 30 Cr. L. J. 1073 = 119 I. C. 532 = 1930 Cr. C. 126.

5. *When conviction need not be set aside* [P. 570, n. 22]—*If the failure has only been to observe the first part of s. 233 [N. 22 (ii)]*—If a trial is properly constituted the mere formal defect of drawing up one charge instead of two, will not vitiate the trial. The offence of kidnapping is quite distinct from the offence of abduction. There should be separate charges in respect of the two offences. But the absence of separate charges will not vitiate the trial if the person could be tried at the same trial both for abduction and kidnapping under s. 235 (2). 60 C. 1394. Failure to comply with the section would be condoned where the offences are committed in one transaction, where the evidence is identical and where care has been taken to consider each item of charge separately and arrive at a distinct finding regarding each one of the offences charged. A. I. R. 1933 Pat. 438 = 14 P. L. T. 580 = 34 Cr. L. J. 892 = 144 I. C. 936 = 1933 Cr. C. 1030; A. I. R. 1934 C. 85 = 37 C. W. N. 1071 = 35 Cr. L. J. 487 = 147 I. C. 828 = 1934 Cr. C. 50; A. I. R. 1934 Oudh 244 = 11 O. W. N. 680 = 1934 O. L. R. 479 = 35 Cr. L. J. 935 = 149 I. C. 231 = 1934 Cr. C. 708. Even if a mandatory provision of the Code has been infringed in framing the charge, the curative provision of s. 537 will apply unless the impugned procedure which is prohibited by the Code also works actual injustice to the accused. 53 M. 937.

SECTION 234.

Notes.—1. *Scope of the Section* [P. 571, n. 1]—This section does not permit of three offences being lumped together so as to be treated as one offence, but merely permits of the trial of the three entirely separate offences at the same trial. A. I. R. 1934 Sind 185 = 1934 Cr. C. 1392.

2. **Offences not of the same kind:**[*P. 572, n. 5*].—Offences under s. 380 and s. 457, I. P. C. are not offences of the same kind and a single charge cannot be framed under this section. *A. I. R. 1932 B. 277 = 34 Bom. L. R. 590 = 33 Cr. L. J. 619 = 138 I. C. 520 = 1932 Cr. C. 389 = 18 A. I. Cr. R. 372.*

3. **Effect of joinder of more than three distinct offences** [*P. 572, n. 6*].—Joinder of more than three distinct offences of criminal breach of trust is an infringement of the plain provision of law and is an illegality vitiating the trial. *A. I. R. 1933 Rang. 325 = 34 Cr. L. J. 1179 = 146 I. C. 176 = 1933 Cr. C. 1172; A. I. R. 1935 Oudh 273 = 1935 O. W. N. 185 = 1935 O. L. R. 157 = 154 I. C. 320.* Where the complaint mentioned six offences of evasion of tolls, conviction at one trial was a material irregularity which prejudiced the accused. *A. I. R. 1935 B. 24 = 36 Bom. L. R. 1124 = 154 I. C. 556 = 1935 Cr. C. 25.* Non-compliance with the provisions of this section vitiates the trial. *A. I. R. 1930 M. 503 = 3 M. Cr. C. 135 = 31 Cr. L. J. 1195 = 127 I. C. 295 = 1930 Cr. C. 580 = 15 A. I. Cr. R. 146.*

4. **Inclusion in one charge of offences committed beyond the space of twelve months is not a mere irregularity.**—Where the period mentioned in the charge is one of fifteen months, thereby offending against the provisions of s. 234, and there was nothing to show that the charge was framed in any error or by any mistake, it is a matter which is more than a mere irregularity to which s. 537, would not apply and the trial is vitiated. In such a case the question whether or not a failure of justice has been occasioned thereby does not arise. *34 C. W. N. 959 = A. I. R. 1931 C. 357 = 128 I. C. 816 = 32 Cr. L. J. 195 = 1931 Cr. C. 354.*

5. **Falsification of accounts—whether more than three falsifications can be proved** [*P. 573, n. 7*].—When a person is charged with falsification of accounts, any number of falsifications may be proved in order to sustain the principal charge of falsification. Moreover, if the intention of the accused is to defalcate a certain amount, the actual method adopted in order to facilitate the defalcation must be taken as forming one transaction with the defalcation within the meaning of s. 235, as part of the *res gestae*. If the intention is to defalcate a certain amount any act done to achieve the object, as making false entries, must form part of the same transaction. *34 C. W. N. 925 = 1931 Cr. C. 40 = 129 I. C. 356 = 32 Cr. L. J. 318 = A. I. R. 1931 C. 8.* But where the charge in its terms is in respect of making false entries in distinct pay-sheets which are more than three in number and spread over a period of as many months, the offence of making false entries is a distinct offence with reference to each sheet and therefore joinder of such charges is a distinct violation of s. 234. *54 C. L. J. 470 = 1932 Cr. C. 320 = 137 I. C. 179 = 33 Cr. L. J. 357 = A. I. R. 1932 C. 377.*

6. **Falsification of accounts and breach of trust are distinct offences** [*P. 573, n. 8*].—Three offences of criminal breach of trust may be tried together and three offences of falsification of accounts may be tried together. But the offence of criminal breach of trust is not the same kind as the offence of falsification of accounts. Therefore the trial of two or more charges of criminal breach of trust cannot legally be joined with two or more charges of falsification of accounts. *55 C. L. J. 111 = 36 C. W. N. 542 = 136 I. C. 136 = 33 Cr. L. J. 265 = A. I. R. 1932 C. 486 following 41 C. 722; A. I. R. 1932 Sind 64 = 1932 Cr. C. 284 = 26 S. L. R. 191 = 138 I. C. 618 = 33 Cr. L. J. 650; A. I. R. 1933 Nag. 327 = 144 I. C. 94 = 34 Cr. L. J. 673 = 1933 Cr. C. 1328.* But in *10 Pat. 463*, it was held that it was lawful to charge a person with criminal breach of trust in respect of a lump sum of money made up of three different items and to link with that a series of charges of falsification, each of which charges is united with one of the items of embezzlement provided the charges of embezzlement are linked together into one sum and that linking together also affects the charges of falsification. This decision was followed in *13 Pat. 170* and *A. I. R. 1935 C. 312*.

SECTION 235.

Notes.—1. Scope of the section—ss. 235 and 236 whether mutually exclusive.—There is no reason why if both the sections 235 and 236 are in terms applicable to a case, and if their application does not lead to any anomalous result, they should not be applied. Several charges being rightly joined against the same accused under s. 235, there can be no objection to one of such charges being in the alternative as provided by s. 236 nor can there be any objection to another accused being joined under s. 239 as regards one of those charges. No conflict arises in consequence of joinder of charges and joinder of accused in the same trial in the manner indicated above. *54 A. 337.* The accused was alleged to have (1) instigated a boy to commit theft, (2) dishonestly received stolen property from the boy and (3) kidnapped the boy from lawful guardianship. Under s. 235 (1) alone the accused could and should have been charged with and tried at one trial for offences under ss. 379/109

411 and 363, I. P. C. The Magistrate charged him only with offences under ss. 379 and 363, I. P. C. The Sessions Judge altered the conviction under s. 379 to one under s. 411, I. P. C. It was argued that when the provisions of s. 235 are utilised by way of an exception to the general rule contained in s. 233 no other section such as s. 236 can also be brought into use. It was held that ss. 235 and 236 should not be held to be mutually exclusive, so that whenever a person is tried for two or more offences committed in the course of the same transaction, s. 236 must be deemed to be expunged from the Code. The accused could have been charged under s. 236 with an offence under s. 411, I. P. C. It followed that under s. 237 the Appellate Court was justified in altering the conviction to one under s. 411. 53 A. 233. *Contra.*—s. 235 (1) and s. 236 are mutually exclusive, and if a case is governed by one of them it cannot be governed by the other. 67 M. L. J. 583 = (1934) M. W. N. 994 = 40 M. L. W. 586 = A. I. R. 1934 M. 673 = 1934 M. Cr. C. 261 = 35 Cr. L. J. 1503 = 152 I. C. 154 = 1934 Cr. C. 1307.

2. Meaning of the phrase "same transaction" [P. 577, n. 4]—The mere fact that two offences are committed at the same time or place is neither necessary nor decisive as an indication of their being so connected as to form the same transaction nor are the offences so regarded merely because they may be inspired by one and the same general object such as that of deceiving the public or plunder. Joint trials except where they are clearly authorised by the law do not save time in the long run and further the ends of justice and it has been repeatedly held that where the legality of a joinder of charges is doubtful, the correct course is to hold a trial clearly authorised by law. A. I. R. 1931 Pat. 102 = 12 P. L. T. 12 = 1931 Cr. C. 230 = 32 Cr. L. J. 611 = 130 I. C. 796. The words "same transaction" suggests not necessarily proximity in time so much as continuity of action and purpose. A. I. R. 1931 Pat. 52 = 1931 Cr. C. 148 = 130 I. C. 269 = 32 Cr. L. J. 478 = 16 A. I. Cr. R. 57. To determine whether or not a series of acts would form parts of the same transaction the most important points to be considered are whether there was a common purpose and design and continuity of action. Where money was received on different dates but in fulfilment of the common design of black-mailing, the receipt of money on several dates form one transaction. A. I. R. 1933 C. 308 = 56 C. L. J. 73 = 1933 Cr. C. 408 = 143 I. C. 120 = 34 Cr. L. J. 530. See n. 1 to s. 239.

3. Cases where facts held not to form one transaction [P. 579, n. 5]—Where the accused was charged with cheating several villagers under s. 420, I. P. C. in the course of a month or two, and the charge as framed covered no less than 80 separate acts of cheating, which were distinct, separate and wholly unconnected, it was held that the conviction cannot stand. A. I. R. 1931 Pat. 102 = 12 P. L. T. 12 = 1931 Cr. C. 230 = 32 Cr. L. J. 611 = 130 I. C. 796. Where the accused was charged with editing and printing at a certain place, of articles offending against the Indian States Protection against Disaffection Act, 1922 and publishing the same at six different places on different occasions, it cannot be regarded as one series of acts so connected together as to form the same transaction within the meaning of this section. A. I. R. 1935 Nag. 90.

4. Cases where facts held to form one transaction [P. 580, n. 6]—Where the accused, a Sub-Inspector of Police wrongfully confined certain persons and beat them to extort a confession as a result of which one of the persons committed suicide and after the inception of proceedings against him altered the case-diary in order to create evidence in his favour, it was held that the case fell under illustration (f) and that the transaction of making a series of false entries so as to attribute another cause for the death was in continuation of and pursuant to the same transaction of voluntarily causing grievous hurt with a view to extorting confession. 56 B. 488. Where the common object of an unlawful assembly gradually changed with the course of events with the result that the offences of riot, of murder in the course of riot and of voluntarily causing grievous hurt to a police-officer discharging his duties and of dacoity with murder were committed by the unlawful assembly, the series of events constituted one and the same transaction under s. 235. A. I. R. 1935 Oudh 190 = 1935 O. W. N. 145 = 1935 O. L. R. 78 = 153 I. C. 978 = 1935 Cr. C. 279.

5. Conspiracy and the offences to commit which the conspiracy was entered into form one transaction. [P. 582, n. 7]—Where in pursuance of the criminal conspiracy certain acts are done by the persons taking part in the conspiracy those acts form part of the same transaction and the accused may be charged with and tried at one trial for those offences. 58 B. 23; 56 B. 304; 57 M. 545; A. I. R. 1934 Sind 57 = 28 S. L. R. 119 = 151 I. C. 494 = 1934 Cr. C. 628 = 35 Cr. L. J. 1337. See note 5 to s. 239.

6. Retention of property stolen at different times is a single transaction [See P. 582, n. 8]—It does not follow from the mere fact that the several articles were stolen on different dates and that there is no evidence of separate acts of reception, that the retention of each article on a given date is not part of a single

transaction. "Transaction" in this section does not merely imply some active step. It is synonymous with "affair." The simultaneous possession of a number of bullocks at a fair and the offer of them for sale is one "transaction" and any number of separately stolen bullocks may be the subject of a single trial. 13 Pat. 161.

SECTION 236.

Notes.—1. Are sections 235 and 236 mutually exclusive?—See note 1 to s. 235.

2. No alternative charge when facts are in doubt [*P.* 586, *n.* 2].—The provisions of this section cannot be applied where the facts are in doubt, but only where the facts being ascertained, it is doubtful which of two or more offences those facts constitute. If the facts are in doubt or if the ascertained facts are consistent with innocence, the section does not apply. 59 C. 92; 59 C. 8. The doubt contemplated by this section is what offence the facts disclosed by the evidence in the committing Magistrate's Court and any evidence which may be in the hands of the prosecution and of which notice had been given, would constitute. Whether the jury would believe that evidence is irrelevant to the point whether ss. 236 and 237 are applicable or not. Where the evidence is circumstantial, and the decision depends upon the question whether the Court will draw a possible inference, or which of several possible inferences, there exists a doubt within the meaning of this section. A doubt whether the Court will make one and which of the presumptions under s. 114, illustration (a) of the Evidence Act is also not such a doubt as is contemplated by this section. 39 C. W. N. 620. In 11 Rang. 354 it was however held that there was nothing in this section or s. 237 to show that they are applicable only when the facts are clear but the law is doubtful and that such a distinction cannot be drawn.

3. Alternative charges of abduction and kidnapping.—The offences of kidnapping and abduction are distinct offences and an alternative charge under this section in respect of those offences is illegal. 60 C. 1394.

4. When Local Government's sanction obtained for charge under one section, alternative charge can be framed under another section.—Where the sanction of the Local Government was obtained for the prosecution of the accused under s. 4-B, Explosive Substances Act, 1908, the Sessions Judge could on perusal of the commitment order frame a charge in the alternative under s. 5 as well. Even if he did not frame a charge under s. 5 he could under s. 237 convict the accused under s. 5 although he was charged under s. 4-B. A. I. R. 1934 A. 982 = 4 A. W. R. 672 = 1934 A. L. J. 1033 = 1934 A. L. R. 1113 = 153 I. C. 147 = 1934 Cr. C. 1302.

SECTION 237.

Notes.—1. Scope and application of Section.—S. 237 only applies to a case to which s. 236 can apply. Under s. 236 there must be no doubt as to the single act or series of acts which constitute that transaction. There must not be any doubt as to the facts. Therefore s. 237 does not apply where the facts themselves are in doubt or where on the facts alleged, the offence is not in doubt. 59 C. 8; 65 M. L. J. 723 = (1933) M. W. N. 718 = 38 M. L. W. 760 = A. I. R. 1933 M. 843 = 1933 M. Gr. C. 248 = 35 Cr. L. J. 76 = 146 I. C. 475 = 1933 Cr. C. 1520. Where the accused was charged with an offence under s. 395, I. P. C. it is not therefore open to the Judge to suggest to the jury some other offence, *e.g.*, those under ss. 323 and 448, I. P. C. simply because there was a doubt as to the question of fact. The accused had no notice of any case under ss. 323 and 448, I. P. C. and there was clearly a misdirection. If it was intended that failing s. 393 the accused might be convicted under ss. 448 and 323, I. P. C. then charges should have been framed under the latter sections. 59 C. 8.

2. Can a person be convicted for the abetment of an offence when charged with the principal offence only? [*P.* 590, *n.* 2].—No universal rule can be laid down to the effect that in no case is a conviction for abetment permissible where only the principal offence has been charged. The question for consideration is what were the facts constituting the charge. Would the same facts support a charge for abetment as well as a charge for the principal offence or would the addition of a charge for abetment introduce new facts which the accused had been given no opportunity to meet? Thus, if the abetment preceded the commission of the principal offence or involved the imputation of collateral circumstances constituting the abetment which were distinct from the circumstances constituting the principal offence, then on a charge of the principal offence it would not be right to convict the accused of abetment of that offence. But if on precisely the same facts charges might have been framed both for the principal offence and for abetment thereof it comes within the purview of this section and the conviction may be altered to one for abetment. 7 Luck. 102; A. I. R. 1930 Nag. 145 = 30 Cr. L. J. 224 = 113 I. C. 881 = 1930 Cr. C. 501 = 12 A. I. Cr. R. 216. Where the accused was charged with theft but was convicted of the offence of abetment of theft in view of

the fact that the actual removal was the work not of the accused but of a boy acting under his directions, it was held that the case fell within the scope of section 236 and the conviction was legal under this section. **59 C. 1192.** Where the accused were convicted of the substantive offence of theft it is not open to the Appellate Court to alter the conviction to one of abetment of theft holding that they were proved to have instigated the other accused to commit theft when in fact the latter had been acquitted of theft by the lower Court. (1932) **M. W. N. 1216.**

3. Conviction for an offence not charged is legal if the evidence is such as to establish it [*P. 591, n. 4*].—A conviction for an offence for which a particular set of facts are required to be proved cannot be converted into a conviction for an offence for which quite a different set of facts are the constituents. **11 Pat. 392.** Where the Lower Court convicted the accused for an offence under s. 430, I. P. C. read with s. 114, I. P. C. but the Appellate Court held that the facts proved amounted to the principal offence, held that the action of the Appellate Court was right. A man may be convicted of an offence although there has been no charge in respect of it if the evidence is such as to establish a charge that might have been made. (6 *Lah. 226 P. C. foll.*) **A. I. R. 1931 M. 225 = (1930) M. W. N. 1041 = 3 M. Cr. C. 390 = 1931 Cr. C. 321 = 131 I. C. 458 = 32 Cr. L. J. 753 = 35 M. L. W. 98 ; A. I. R. 1932 Pat. 302 = 13 P. L. T. 440 = 1932 Cr. C. 774 = 140 I. C. 346 = 34 Cr. L. J. 33 ; 3 Luck. 474.** Where the accused was proved to have made a concerted attack upon the deceased along with another accused, and there was no definite finding regarding the specific injuries inflicted by him, he could be convicted under s. 325 read with s. 34, I. P. C. even though he was only charged under s. 325 especially when he was in no way misled in his defence. **A. I. R. 1933 Lah. 313 = 1933 Cr. C. 547 = 144 I. C. 300 = 34 Cr. L. J. 724 = 34 P. L. R. 699.** A person charged with rioting and of being liable under s. 149 constructively for culpable homicide not amounting to murder may be convicted of assault under s. 352, I. P. C. even though he was not specifically charged with that offence, if he has not been misled in his defence. **9 Pat. 642.**

Murder and simple hurt.—Where the accused were found not constructively liable for the murder of X and had been acquitted in respect of charges under s. 302/149, I. P. C. but were convicted of causing simple hurt to Y in the course of the same transaction, and the latter offence was clearly brought out by the evidence, it was held that the conviction was legal under this section. **A. I. R. 1931 Lah. 566 = 1931 Cr. C. 854.** *Kidnapping and rape*—where the accused was charged under s. 366, I. P. C. he can be convicted for an offence under s. 376, I. P. C. **A. I. R. 1932 A. 530 = 1932 A. L. J. 776 = 1932 Cr. C. 698 = 18 A. I. Cr. R. 297 = L. R. 13 A. (Gr.) 140 = 141 I. C. 127 = 34 Cr. L. J. 100.** *House-breaking with intent to commit theft, etc., and receiving stolen property.*—Where a person has been charged under s. 457 of house-breaking with intent to commit theft, he can be found guilty of receiving the property stolen at that house-breaking. **A. I. R. 1932 Nag. 173 = 28 N. L. R. 218 = 1932 Cr. C. 908 = 34 Cr. L. J. 66 = 140 I. C. 431.** A person charged with dacoity under s. 397 can be convicted under s. 412 for dishonestly receiving stolen property knowing it to have been obtained by dacoity. **A. I. R. 1930 Oudh 353 = 7 O. W. N. 527 = 31 Cr. L. J. 1210 = 127 I. C. 247 = 1930 Cr. C. 841.** *Charge of Murder—Substantive and Constructive.*—Where the accused were charged under s. 302/149, I. P. C. they could be convicted under s. 302 where on the facts a substantive charge of murder could have been framed against them. **A. I. R. 1932 Pat. 302 = 13 P. L. T. 440 = 1932 Cr. C. 774 = 140 I. C. 346 = 34 Cr. L. J. 33.** *Murder and causing disappearance of evidence.*—Where the evidence was insufficient to show which of the two accused actually participated in the murder, a conviction under s. 201, I. P. C. when warranted by the evidence, is legal. **56 M. 63.**

4. Conviction for offence not charged, on appeal.—See note 14 to s. 423.

5. Conviction for offence not charged, on reference under s. 307.—See note 7 to s. 307.

6. Operation of section limited to cognate offences [*P. 591, n. 5*].—*Murder and fabricating false evidence, ss. 302 and 194, I. P. C.*—An offence under s. 194 brings into the field an entirely different set of circumstances and involves the fabrication of a false charge against a third party which is in no way involved in a case of murder or a case of causing the evidence of murder to disappear. A conviction under s. 194 should not be passed where the accused person has not been asked to plead to the charge. **A. I. R. 1933 A. 30 = 1932 A. L. J. 1079 = L. R. 14 A. (Gr.) 13 = 34 Cr. L. J. 445 = 142 I. C. 803 = 1933 Cr. C. 41 = 19 A. I. Cr. R. 52.**

7. No conviction in the alternative.—Though an accused may be charged in the alternative under s. 236, judgment under s. 237 cannot be passed in the alternative convicting the accused of two or more offences in the alternative. **39 C. W. N. 620.**

8. Person charged with offence read with s. 149, I. P. C. may be convicted of the offence read with s. 34, I. P. C.—When a charge is made of an offence with reference to s. 149, I. P. C. it will not be illegal to convict the accused of that offence read with s. 34, I. P. C. if no prejudice is occasioned to the accused persons in their defence. **67 M. L. J. 355 = 40 M. L. W. 476 = 1934 M. W. N. 241 = 1934 M. Cr. C. 65 = A. I. R. 1934 M. 565 = 36 Cr. L. J. 113 = 152 I. C. 554 = 1934 Cr. C. 1237.** If the accused has been charged with an offence under s. 326, I. P. C. read with s. 149, I. P. C. but has been convicted under s. 326 read with s. 34 the conviction is not necessarily bad by reason of the absence of a specific charge under the latter section. **A. I. R. 1934 Sind 89 = 28 S. L. R. 12 = 36 Cr. L. J. 53 = 151 I. C. 976 = 1934 Cr. C. 743.** When a person is charged by implication under s. 149 he can be convicted of the substantive offence. **A. I. R. 1935 Sind 34 = 28 S. L. R. 304 = 1935 Cr. C. 163.**

SECTION 238.

Notes.—1. Offences not falling within the scope of this section [P. 593, n. 4]—An offence under s. 369, I. P. C. can scarcely be held to be a minor offence in relation to s. 392, I. P. C. and s. 238 (2) cannot be applied to justify a conviction under s. 369, I. P. C. when the charge was under s. 392, I. P. C. **A. I. R. 1930 Lah. 544 = 31 P. L. R. 731 = 32 Cr. L. J. 301 = 129 I. C. 300 = 1930 Cr. C. 592.** Mischief is not a minor form of criminal breach of trust. **8 Rang. 13.**

2. Where offence is composite, the accused may be convicted on any element of it [P. 594, n. 5]—When the charge under s. 454, I. P. C. indicated that the trespass was committed with the intention of committing theft the accused could be convicted for having committed trespass with the object of committing an offence. **A. I. R. 1935 Pat. 129 = 1935 Cr. C. 329.**

3. Conviction for adultery without complaint [P. 594, n. 6]—Where the accused was prosecuted under s. 366-A, I. P. C. he could not be convicted for an offence under s. 498, I. P. C. without a complaint by the husband as required by s. 199. The fact that he had come forward to give evidence in the prosecution under s. 366-A, I. P. C. does not cure the defect in procedure. **55 A. 871.**

4. Conviction for minor offence where evidence insufficient to prove graver offence [P. 595, n. 10]—Where an accused was charged under s. 304, I. P. C. he can be convicted under s. 325, I. P. C. without altering the original charge and without adding a specific charge under s. 325. **A. I. R. 1934 Oudh 251 = 11 O. W. N. 698 = 1934 O. L. R. 494 = 35 Cr. L. J. 943 = 149 I. C. 343 = 1934 Cr. C. 710.** A charge of rioting does not include as a minor offence any specific act of violence by an individual accused so as to authorise under s. 238, a conviction under s. 352, I. P. C. **9. Pat. 642.**

SECTION 239.

Notes.—1. Offences committed in the course of the same transaction—clause (d).—A precise definition of the expression “the same transaction” cannot be formulated, and each case must depend on its own facts. It is for the Court to decide whether in each case there is sufficient continuity of purpose between the acts of the jointly tried accused to justify it in finding that the transaction was in reality a single one. **57 B. 400; 8 Luck. 199.** To justify a joint trial there must be evidence that there was prior consultation or community of purpose amongst the accused. **A. I. R. 1933 Nag. 353 = 16 N. L. J. 196 = 34 Cr. L. J. 1175 = 146 I. C. 116 = 1933 Cr. C. 1552.** The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, community of purpose or design and continuity of action. **A. I. R. 1934 Oudh 499 = 11 O. W. N. 1309 = 1934 O. L. R. 810 = 35 Cr. L. J. 1496 = 152 I. C. 103 = 1934 Cr. C. 1379.** In a transaction all the persons engaged need not have a common object. **53 M. 937.** Where certain villagers contrary to the orders of the Public Works Department but with the object of obtaining a common benefit, *viz.*, to get water to their tank opened the sluice and removed the dam which diverted the water from their tank, once in the night and again twice on the morning of the next day *held*, that it cannot be said that the villagers were each opening the sluice for his own purpose. They were not distinct acts or independent adventures by different bodies of men each acting independently of the other but they were a number of acts for which there was a community of purpose or design and continuity of action and should therefore be regarded as one transaction. **A. I. R. 1931 M. 225 = (1930) M. W. N. 1041 = 3 M. Cr. C. 390 = 1931 Cr. C. 321 = 131 I. C. 458 = 32 Cr. L. J. 753 = 35 M. L. W. 98.** See note 2 to s. 235.

2. **What provisions of the former part of this chapter apply to this section** [*P. 597, n. 4*].—The provisions of s. 239 stand by themselves and the scope thereof cannot be extended by the use of the provisions of sections not referred to in s. 239. A joint trial of two persons on three separate charges of embezzlement or in the alternative with abetment thereof is illegal as each accused has to meet six distinct sets of circumstances. The provisions of s. 236 cannot be utilised to declare the charge in the alternative of embezzlement and abetment thereof to be one charge. 51 A. 544. But in 56 C. 1106 it was held that where two or more accused persons were tried together under s. 239 it is possible to have an alternative charge against one of the accused persons. Provided the offences were committed in the course of the same transaction it is immaterial whether the charge is an alternative one under s. 236 or is a distinct charge. A. I. R. 1929 C. 160 = 30 Cr. L. J. 619 = 116 I. C. 369 = 13 A. I. Cr. R. 4.

3. **In a joint trial of two or more persons, one or more of them could be further charged with another offence.**—Three accused persons were charged jointly under s. 411, I. P. C. for being in dishonest possession of stolen property belonging to one individual. One of the accused was further charged under s. 411, I. P. C. in respect of property stolen from another individual on a different date. It was held that there was no misjoinder. The joint trial of the three accused under the first charge was proper as the offence was committed by them in the course of the same transaction. As regards the additional charge against one of the accused, s. 234 permitted the framing of charges for more offences than one of the same kind, not exceeding three and there is nothing in s. 239 that as regards one or more of the persons accused there should be no application to that person or persons of the previous sections such as s. 234. 1934 A. L. J. 653 = A. I. R. 1934 A. 811 = 4 A. W. R. 294 = L. R. 15 A. (Cr.) 143 = 1934 A. L. R. 791 = 35 Cr. L. J. 1224 = 150 I. C. 1140 = 1934 Cr. C. 996 = 21 A. I. Cr. R. 259.

4. **Misjoinder renders the trial illegal** [*P. 598, n. 10*].—Where persons accused of different offences not committed in the course of the same transaction are jointly charged and tried, the trial is illegal. S. 537 does not apply to a case of this nature. A. I. R. 1933 A. 354 = 1933 A. L. J. 1595 = L. R. 14 A. (Cr.) 107 = 34 Cr. L. J. 863 = 144 I. C. 974 = 1933 Cr. C. 627 = 19 A. I. Cr. R. 319; A. I. R. 1934 B. 255 = 35 Cr. L. J. 1234 = 151 I. C. 99 = 1934 Cr. C. 946. The legality of a joint trial depends on the accusation and not on the result of the trial. A. I. R. 1929 C. 160 = 30 Cr. L. J. 619 = 116 I. C. 369 = 13 A. I. Cr. R. 4.

5. **Cases where joint trial held valid** [*P. 598*].—*Joint trial of several receivers of stolen property* [See *P. 604, n. 35*].—The phrase "possession of which has been transferred by one offence" in clause (f) is a reference to the original theft of the stolen property. Where the property was originally stolen on one occasion this section will apply. A. I. R. 1932 B. 201 = 34 Bom. L. R. 301 = 33 Cr. L. J. 394 = 137 I. C. 146 = 1932 Cr. C. 305.

Persons charged with offences under s. 376, I. P. C.—Where two police-men committed rape successively on a defenceless woman in the police-station, it was obvious that the separate acts of rape could not have been severally committed unless they had been tacitly agreed to or reciprocally connived at by each of the accused in his turn. There was either a tacit agreement between them or an acquiescence on the part of each in what the other did. The transaction was therefore essentially single and a joint trial was proper. 57 B. 400.

Joint trial in cases of conspiracy [*P. 600, n. 22*].—Where one accused was caught while in possession of revolutionary leaflets and another accused was found distributing similar leaflets at a different place, there is nothing wrong in introducing s. 120-B, I. P. C. to justify a joint trial. 37 C. W. N. 426 = A. I. R. 1933 C. 603 = 34 Cr. L. J. 1073 = 145 I. C. 814 = 1933 Cr. C. 967. Joint trial of persons charged with the offence of conspiracy and also with the offences alleged to have been committed in pursuance of the conspiracy is permissible, because the substantive offence of conspiracy and the offences committed in pursuance thereof form one and the same transaction. A. I. R. 1934 A. 61 = 1934 A. L. J. 852 = 1934 Cr. C. 130 = 151 I. C. 442 = 35 Cr. L. J. 1349; 53 B. 844; (1933) M. W. N. 528; 7 Rang. 821. See note 5 to s. 235.

Persons charged with forgery and abetment of forgery and using forged documents as genuine.—Where one of the accused forged the document and the other assisted him in the commission of the offence and using the same as genuine, the offences formed part of one and the same transaction and a joint trial was legal. 52 M. 532.

Offences under other Acts—ss. 3 and 4, U P. Gambling Act—The offence of keeping a gaming house and the offence of using it are offences committed in the same transaction and the offenders can be jointly tried. A. I. R. 1929 A. 937 = 1930 A. L. J. 229 = L. R. 11 A. (Cr.) 21 = 31 Cr. L. J. 35 = 120 I. C. 266 = 1929 Cr. G. 665 = 13 A. I. Cr. R. 138.

6. If offences are distinct and separate, joint trial illegal—[P. 603, n. 34]—Where two persons were charged with misappropriation of various items, but they were independent transactions carried out by the accused independently of one another a joint trial of the two persons was illegal. 11 Pat 779. Where the accused were charged at one trial with having committed six dacoities in one night, held that the mere fact that the dacoities were committed in one night will not make the six dacoities part of one and the same transaction. A joint trial of all the accused in respect of the six dacoities is an illegality which could not be cured by s. 537. A. I. R. 1934 Oudh 325 = 11 O. W. N. 731 = 1934 O. L. R. 564 = 35 Cr. L. J. 1043 = 149 I. G. 959 = 1934 Cr. G. 878.

7. Cases where joint trial held illegal [P. 601]—*Persons charged with offences under ss. 401 and 411, I. P. C.*—The offence of being a member of a wandering gang of persons of the kind described in s. 401, I. P. C. and the offence of receiving stolen property from members of the gang on different occasions cannot be said to be committed in the course of the same transaction. A. I. R. 1932 Lah. 436 = 138 I. C. 424 = 33 P. L. R. 736 = 1932 Cr. G. 624 = 33 Cr. L. J. 534.

Persons charged with abduction, kidnapping and abduction, etc.—Where some of the accused were charged with kidnapping and abduction, some with abduction only and another with concealing the kidnapped person under s. 368, I. P. C. the joint trial of all the accused was illegal. A. I. R. 1933 G. 563 = 144 I. C. 93 = 34 Cr. L. J. 632 = 1933 Cr. G. 940.

Persons charged under ss. 240, 243 and 240/243 109, I. P. C.—Where one accused was charged under s. 240, I. P. C. with offering a coin knowing it to be counterfeit, another under s. 243, I. P. C. for being in possession of such a coin and a third who was a resident of a different place, under s. 240/243/109, I. P. C. and there was no evidence of conspiracy, it was held that a joint trial was illegal. A. I. R. 1933 Lah. 223 = 1933 Cr. G. 348 = 146 I. C. 261 = 34 Cr. L. J. 1253.

Joint trial of thief and receiver of stolen property [P. 599, n. 17]—Ordinarily speaking theft and receiving of stolen property are not part of the same transaction. Where the theft was completed and later on the persons alleged to be thieves endeavoured to dispose of the property with the assistance of friends and relations, the facts would not make the offences part of the same transaction. A. I. R. 1929 Lah. 142 = 29 Cr. L. J. 1030 = 112 I. C. 534.

SECTION 240.

Note.—Provisions of the section not confined to the trial Court [P. 606, See n. 6]—The provisions of s. 240, apply to every grade of Court, not only to the Court of trial. The charge can be withdrawn in the Court of revision. 51 A. 977.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

SECTION 241.

Note.—Chapter not applicable when warrant-case and summons-case are jointly tried [P. 607, n. 2].—When a summons case and a warrant-case are tried together the procedure to be followed is the procedure prescribed for warrant-cases. A. I. R. 1933 Rang. 343 = 34 Cr. L. J. 1130 = 146 I. C. 173 = 1933 Cr. G. 1153.

SECTION 242.

Notes.—1. Effect of omission to state particulars of offence.—An omission to state the particulars of the offence, unaccompanied by any probable suggestion of failure of justice having been thereby occasioned, is cured by the provisions of ss. 535 and 537. A. I. R. 1932 Nag. 127 = 28 N. L. R. 163 = 1932 Cr. G. 673 = 33 Cr. L. J. 938 = 140 I. C. 113.

2. Magistrate need not record questions put to accused.—This section does not say that the Magistrate shall make a record of what he stated to the accused in explaining the offence. It is sufficient if the proceedings show that he had orally explained to the accused what the offence was and asked him to show cause. *A. I. R. 1934 Nag. 253 = 153 I. C. 427 = 1934 Cr. C. 1297.*

SECTION 243.

Notes.—1. Procedure if plea of "guilty" is not accepted [*P. 608, See n. 2*].—The Magistrate has a discretion to accept or not to accept the plea of "guilty." If he does not accept the plea of "guilty" and proceeds to hear evidence, he must then satisfy himself that the evidence justifies a conviction. If he hears the evidence and it does not prove the facts of the charge, it is not open to him to go back and accept the plea of guilty and sentence the accused. It is no doubt open to the Magistrate to accept the plea of guilty and call for evidence to enable him to arrive at a proper conclusion as to the sentence. But that is a different matter. *33 Bom. L. R. 340 (F. B.) = A. I. R. 1931 B. 195 = 1931 Cr. C. 339 = 131 I. C. 473 = 32 Cr. L. J. 719 = 16 A. I. Cr. R. 322.*

2. Admission of truth of allegation does not amount to plea of guilty.—Where the accused, in answer to the Magistrate's questions said that he "admitted the truth of the allegation" it is difficult to construe this as an admission that he has "committed the offence of which he is accused." *A. I. R. 1931 Nag. 101 = 14 N. L. J. 39 = 1931 Cr. C. 452 = 32 Cr. L. J. 1132 = 134 I. C. 261; A. I. R. 1932 Lah. 363 = 33 P. L. R. 273 = 1932 Cr. C. 492 = 133 I. C. 400 = 33 Cr. L. J. 646.* Where the accused answered "guilty" but proceeded to explain how he was not responsible for the accident, it was held that Courts should not be astute to construe technical words inadvertently used by accused persons not trained to the law against them, but should look to the statement as a whole and place a fair and liberal construction on it giving the benefit of every reasonable doubt to the accused. *A. I. R. 1934 Nag. 65 = 30 N. L. R. 317 = 35 Cr. L. J. 696 = 143 I. C. 541 = 1934 Cr. C. 272.*

3. Admission of each accused must be recorded separately.—The section requires the words of each accused as nearly as possible to be recorded. To record one admission for a number of accused persons is open to objection. *A. I. R. 1932 Sind 211 = 1932 Cr. C. 902 = 26 S. L. R. 345 = 34 Cr. L. J. 67 = 140 I. C. 697.*

SECTION 244.

Notes.—1. Magistrate must examine complainant and his witnesses [*P. 609, n. 1*].—Where the accused pleads that the acts alleged formed no offence, it is the duty of the Magistrate to hear all the evidence in support of the prosecution. Failure to obey the compulsory provisions of this section cannot be justified. *54 A. 416.*

2. Magistrate bound to compel the attendance of witnesses already summoned [*P. 610, n. 6*].—There is no discretionary power given in summons-cases by s. 244 to refuse to compel the attendance of a witness upon whom the Court has already issued process. *A. I. R. 1933 Pat. 494 = 14 P. L. T. 453 = 34 Cr. L. J. 1203 = 146 I. C. 54 = 1933 Cr. C. 1033.*

SECTION 245.

Notes.—1. Order of acquittal cannot be passed without taking evidence for prosecution [*P. 611, n. 8*].—It is not open to the Magistrate to refuse to examine the complainant and the witnesses produced by him and the acquittal of the accused without recording any evidence is clearly illegal. (1931) *M. W. N. 1050 = 35 M. L. W. 140 = A. I. R. 1932 M. 25 (2) = 33 Cr. L. J. 274 = 136 I. C. 314 = 18 A. I. Cr. R. 15.*

2. On conviction the Magistrate must pass some sentence [*P. 611, n. 7*].—Both sections 245 and 258 are mandatory provisions and the Magistrate is bound to pass a sentence according to law, even though it may be nominal, if he finds the accused guilty. *12 Ran. 419.*

SECTION 247.

Notes.—1. On non-appearance of complainant complaint must be dismissed [*P. 612, n. 2*].—If the complainant is absent when the case is called up there is nothing illegal in the Magistrate's dismissing the case. What latitude he will grant, is entirely discretionary. (1932) *M. W. N. 647 = 36 M. L. W. 379 =*

A. I. R. 1932 M. 563 = 5 M. Cr. C. 131 = 133 I. C. 283 = 1932 Cr. C. 662 = 33 Cr. L. J. 579. But the mere unexplained absence of a complainant when the case is called, not for hearing but only for the purpose of fixing a new date, is not a good ground for taking action either under this section or under s. 249. **36 Bom. L. R. 105 = A. I. R. 1934 B. 130 = 35 Cr. L. J. 1139 = 150 I. C. 853 = 1934 Cr. C. 475 = 21 A. I. Cr. R. 316.** If the case was adjourned only for judgment, the Court should not acquit the accused under this section, which can be applied only when the case is adjourned *for hearing*. (1933) **M. W. N. 1271.**

2. Complainant must be present only on the date fixed—dismissal of complaint other than on date fixed is a nullity.—The words of the section provide for the dismissal of a complaint in the absence of the complainant on the day fixed for the appearance of the accused. If the Magistrate under a mistake took up the case on a day for which it was not fixed and dismissed the complaint, the order of dismissal is not one under s. 247 and is a mere nullity. **1934 A. L. J. 1061 = A. I. R. 1934 A. 1025 = 4 A. W. R. 794 = 1934 A. L. R. 1153 = 153 I. C. 407 = 1924 Cr. C. 1335.**

3. Must the accused be acquitted on death of complainant? [*P. 612, n. 4*].—It is open to doubt whether this section applies to a case where the complainant is dead. If it does not, there is nothing to prevent the Magistrate from going on with the proceedings. But even if it does apply, there is nothing in the section to prevent an adjournment of the case to enable another complainant to be substituted. **A. I. R. 1932 Nag. 72 = 23 N. L. R. 49 = 1932 Cr. C. 272 = 137 I. C. 91 = 33 Cr. L. J. 407 = 18 A. I. Cr. R. 31.** But it was held by the Madras High Court in **51 M. 339** that on the death of the complainant in a summons-case the Magistrate should under this section dismiss the complaint and that it would be illegal for him to grant an adjournment to enable the deceased complainant's son to come on the record and to proceed with the inquiry.

EFFECT OF ACQUITTAL.

4. Acquittal under this section bars trial on the same facts [*P. 613, n. 17*].—When once the accused is acquitted under this section a further complaint on the same facts does not lie, even if good cause be shown for the absence of the complainant as that the complainant's counsel mistook the date of hearing. **A. I. R. 1934 Lah. 211 (2) = 1934 Cr. C. 446 = 152 I. C. 156.**

In a summons-case the fact that the Court adopted a warrant-case procedure cannot affect the right of the accused to an acquittal under this section even though the order is described as one of discharge. (1933) **M. W. N. 1273.**

SECTION 249.

Note.—No further inquiry under s. 436 when proceedings stopped under this section [*P. 616, n. 3*].—When proceedings are stopped under this section it does not amount to a dismissal of complaint under s. 203 or s. 204 (3) or discharge of a person accused of an offence. S. 436 does not therefore apply to an order under this section and an order for further inquiry cannot be made in such a case. **A. I. R. 1934 A. 17 = 1934 A. L. J. 360 = 1934 A. L. R. 341 = 35 Cr. L. J. 564 = 147 I. C. 1023 = 1934 Cr. C. 45.**

SECTION 250.

OBJECT OF THE SECTION.

Notes.—1. Object of the section not punitive—compensation not fine [*P. 618, n. 3*].—There is no provision in the Code that Government is to be compensated in any way under this section. An order for compensation directing that half the amount should be paid as fine to Government, is illegal. **A. I. R. 1933 Nag. 296 = 34 Cr. L. J. 1163 = 146 I. C. 14 = 1933 Cr. C. 1247 = 30 N. L. R. 15.**

IN RESPECT OF WHAT CASES COMPENSATION MAY BE ORDERED.

2. In cases either frivolous or vexatious [*P. 619, n. 10*].—There should in the first place be a definite finding that the complaint is false. The Magistrate should in the second place make up his mind whether he considers it to be frivolous or whether he considers it to be vexatious. Frivolity is one thing and vexation, quite another. It should not be left ambiguous upon which of these two counts the order is being made. But

upon whichever grounds the Magistrate intends to proceed, it is incumbent upon him to set forth his reasons. A. I. R. 1932 Sind 156 = 138 I. C. 635 = 26 S. L. R. 299 = 33 Cr. L. J. 644 = 1932 Cr. C. 692; A. I. R. 1932 Lah. 554 = 33 P. L. R. 670 = 1932 Cr. C. 713 = 140 I. C. 630 = 34 Cr. L. J. 80; A. I. R. 1933 Sind 226 = 27 S. L. R. 73 = 34 Cr. L. J. 767 = 144 I. C. 412 = 1933 Cr. C. 796. A Magistrate should come to the conclusion that the complaint was false and either frivolous or vexatious only after he had heard the explanation of the complainant. Though there may be good reasons for discharging the accused, when it is sought to make the complainant pay compensation, it must be affirmatively proved that the complainant knew or had good reason to believe that the complaint that he made was false. A. I. R. 1934 Sind 18 = 35 Cr. L. J. 1033 = 149 I. C. 946 = 1934 Cr. C. 227; A. I. R. 1929 Sind 113 = 30 Cr. L. J. 433 = 115 I. C. 334 = 1929 Cr. C. 107 = 12 A. I. Cr. R. 425. When all the witnesses for the prosecution have not been examined, an order for compensation should not be made except in very exceptional cases. (1933) M. W. N. 900. Information which is merely based upon suspicion, if it be expressed as a positive accusation, ought to be regarded as both false and vexatious within the meaning of this section. A. I. R. 1932 B. 177 = 34 Bom. L. R. 289 = 33 Cr. L. J. 392 = 137 I. C. 129 = 1932 Cr. C. 236 = 13 A. I. Cr. R. 11. Where criminal proceedings are started not really *bonafide* but with a view to bring pressure to bear against an opponent in a civil dispute, the Magistrate is abundantly justified in proceeding against the complainant under this section. A. I. R. 1933 B. 233 = 35 Bom. L. R. 434 = 1933 Cr. C. 656 = 144 I. C. 922 = 34 Cr. L. J. 873 = 20 A. I. Cr. R. 343.

3. **Accusation must be about the commission of an "offence."**—Section does not cover application under s. 107 [P. 620, n. 11]—This section does not cover proceedings under Chapter VIII, as an institution of proceedings under s. 107 is not an accusation of an offence. A. I. R. 1935 Lah. 29 = 1935 Cr. C. 20.

4. **Compensation not to be granted in cases exclusively triable by Court of Session** [P. 620, n. 12]—This section is not applicable to offences triable by a Court of Session according to Col. 8, Sch. II. Where a complainant brings a joint accusation of both classes of offences and the Magistrate finds them both to be false, he is competent to award compensation only in respect of offences triable by a Magistrate and if compensation is awarded for both kinds of offences and it is not possible to apportion the amount so awarded between the two, the order is bad for uncertainty and must be set aside as a whole. 11 Lah. 558. A complainant should not be allowed by mentioning a section, a charge under which is exclusively triable by a Court of Session, thereby to bind the Court and at the same time protect himself against a fine for bringing a false and frivolous or vexatious accusation. The criterion should be the form of proceedings, *i.e.*, whether they were conducted under Ch. XVIII or Ch. XXI. 53 A. 461. Where a Magistrate trying a case apparently within his jurisdiction finds that there is no case and that it had been brought frivolously and vexatiously, he is entitled to act under s. 250. It is not incumbent on him to go out of his way to find that a case exclusively triable by a Court of Session might arise from the facts before him, if they were proved. A. I. R. 1930 A. 230 = 1930 A. L. J. 465 = L. R. 11 A. (Cr.) 87 = 31 Cr. L. J. 563 = 123 I. C. 756 = 1930 Cr. C. 443 = 13 A. I. Cr. R. 451.

5. **No compensation for cases instituted on police report** [P. 620, n. 14]—This section will not apply to a case instituted on a police report or on information given by a police-officer. A. I. R. 1932 Sind 156 = 138 I. C. 635 = 26 S. L. R. 299 = 33 Cr. L. J. 644 = 1932 Cr. C. 692.

WHO MAY BE MADE TO PAY COMPENSATION.

6. **Person giving false information to Village Magistrate** [P. 621, n. 17]—Where a person gave false information to a Village Headman about the commission of a non-bailable offence as a result of which the police charged the accused, and the Court found the information given to be deliberately false, an order for compensation could be made under this section. (1935) M. W. N. 81.

PROCEDURE IN SECTION TO BE STRICTLY FOLLOWED.

7. **Complainant must be called on to show cause and his objections recorded** [P. 623, n. 27]—It is mandatory to give the complainant or informant an opportunity to show cause why compensation should not be ordered to be paid by him. Failure to give such opportunity will render the order unsustainable. A. I. R. 1933 Oudh 37 = 9 O. W. N. 943 = 34 Cr. L. J. 44 = 1933 Cr. C. 70 = 140 I. C. 652. The complainant must be given a full chance to prove his case. (1934) M. W. N. 402 (2).

8. **Magistrate bound to record reasons** [P. 623, n. 28]—Even in records of summary trials under Ch. XXII where the Magistrate or Bench acts under s. 250, the requisites as to recording of reasons must be carried out. A. I. R. 1930 M. 929 = 59 M. L. J. 319 = 32 M. L. W. 283 = (1930) M. W. N. 1047 = 3 M. Cr. C. 239 = 32 Cr. L. J. 207 = 129 I. C. 37 = 1930 Cr. C. 1141.

9. **Whether order for payment of compensation must form part of the order of discharge or acquittal** [*P. 623, n. 30*].—The order directing the complainant to show cause must be contained in the order of discharge or acquittal though the actual order of payment may be made in a subsequent order. An accused person cannot apply after the order of discharge or acquittal has been passed, for the initiation of compensatory proceedings. *A. I. R. 1933 Nag. 296 = 30 N. L. R. 15 = 34 Cr. L. J. 1163 = 146 I. C. 14 = 1933 Cr. C. 1247*. Where the order of discharge is not written out until the complainant has had an opportunity to show cause, there is a sufficient compliance with the section. *A. I. R. 1929 C. 332*. When the order to show cause is, though not a part of the judgment, signed immediately after judgment, it can be taken to be part of the same proceeding and continuation of it. *9 Pat. 100*.

APPEAL AND REVISION.

10. **Are appeals under this section governed by Chap. XXXI?** [*P. 625, n. 33*].—Under s. 250 (3) a complainant against whom an order for compensation is made, is, so far as the right of appeal is concerned, put on the same footing as if he had been convicted and sentenced to pay a fine. To find out in what Court the appeal is to be filed we have to resort to the general chapter on appeals and that is, Chap. XXXI and the section applicable is s. 407. Such an appeal is therefore one under Cnap. XXXI, and the Appellate Court has power under s. 428 to take additional evidence. *53 M. 638*.

11. **Powers of appellate Court.**—The section under which the appeal is heard is s. 423 (1) (c) which deals with an appeal from "any other order." There is nothing which debars the Judge in appeal from going into all the facts of the case in order that he may determine whether the case is false and vexatious. It may be that in doing so he may come to findings of fact showing that the acquittal was wrong. That however, is quite immaterial. Right or wrong, he cannot set aside the acquittal, but he can set aside the order of compensation if it is based on wrong findings of fact. *58 C. 1436*.

12. **Notice to accused** [*P. 625, n. 34*].—Having regard to the wording of this section and s. 422 it has to be held that notice to the accused to whom the compensation was ordered to be paid is not necessary; but seeing that in cases under this section the accused is the only person really interested in upholding the order, in most cases it is desirable that notice should be given to him. *A. I. R. 1932 B. 177 = 34 Bom. L. R. 239 = 33 Cr. L. J. 392 = 137 I. C. 129 = 1932 Cr. C. 236 = 13 A. I. Cr. R. 11; A. I. R. 1933 Lah. 545 (2) = 143 I. C. 86 = 34 P. L. R. 442 = 34 Cr. L. J. 533 = 1933 Cr. C. 816*.

MISCELLANEOUS.

13. **Compensation how to be recovered.**—By reason of the provisions of s. 547, money ordered to be paid as compensation under this section is recoverable as if it were a fine; and the methods of recovering a fine are provided by s. 386. *A. I. R. 1932 Pat. 301 (F. B.) = 13 P. L. T. 536 = 1932 Cr. C. 773 = 33 Cr. L. J. 958 = 140 I. C. 72*.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

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SECTION 252.

Note.—Right of accused to cross-examine witnesses before framing of charge [*P. 628, n. 7*].—The words "take all such evidence as may be produced" cannot be construed as necessarily conferring or including the right of cross-examination. In the absence of specific provision for cross-examination the phrase may mean not only examination-in-chief, but also cross-examination and re-examination. But when express provision for cross-examination is made as in s. 256 then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination. But although the accused has no absolute right of cross-examination before the framing of the charge, the Magistrates would generally be exercising a proper discretion if they did permit some cross-examination before charge is framed *54 A. 212*. But in *A. I. R. 1935 Nag. 8 = 154 I. C. 389 = 1935 Cr. C. 77*, it was held that the accused had a right to cross-examine the prosecution witnesses before the charges were framed. *See 8 Luck. 135*.

See note 2 to s. 256.

SECTION 253.

Notes.—1. Does the mention in the charge of a minor offence imply a discharge of the major offence?—Before there can be a discharge, *a fortiori* an implied discharge, the foundation of a charge in the shape of an accusation or an allegation that the more serious offence has been committed, must be in existence, and though it is true that the framing of a charge under a minor section is tantamount to a discharge under a more serious section of the same type or family of offences, it is only true if the commission of a more serious offence has been alleged from the start and the Magistrate must visualize or have been invited to visualize the possibility of framing a more serious charge. **A. I. R. 1931 Lah. 402 (2) = 1931 Cr. C. 642 = 133 I. C. 633 = 32 Cr. L. J. 1029.**

2. Whether Magistrate can revive proceedings after discharge [*P. 631, n. 18*].—A complaint was made of offences punishable under ss. 406, 409 and 477, I. P. C. The Magistrate framed a charge under s. 204, I. P. C., and eventually acquitted the accused. On revision, the High Court ordered a retrial in respect of the charge under s. 204. The Lower Court then framed a charge also under s. 409, I. P. C. **Held** that when a charge was framed only under s. 204 it amounted to a discharge of the accused in regard to the other offences and the framing of the additional charge on retrial cannot be justified. (1932) **M. W. N. 1213 = 36 M. L. W. 623 = A. I. R. 1933 M. 65 (2) = 5 M. Cr. C. 346 = 33 Cr. L. J. 825 = 139 I. C. 852 = 1933 Cr. G. 109 distinguishing 31 M. 543.**

3. Discharge—when to be under sub-section (1) and when under sub-section (2).—The Court has two alternatives to follow. It may take all the evidence and then decide as prescribed by sub-section (1). But if, on the other hand, it finds that the case is so transparently false or beyond the jurisdiction of the criminal Courts, it is competent under sub-section (2) to discharge the accused without hearing the evidence. But the two clauses should not be mixed up. **A. I. R. 1935 Pesh. 23 = 1935 Cr. C. 171.** A Magistrate can discharge the accused at any stage before recording any evidence, or if in the course of recording evidence, he is of opinion that the charge is groundless. **33 C. 346.** The Magistrate is not bound to examine all the witnesses that may be offered or available before taking action under sub-section (2). **52 M. 937.**

SECTION 254.

Notes.—1. When charge to be framed [*P. 632, n. 3*].—S. 254 requires a Magistrate to frame a charge only when he is of opinion that an offence punishable with death, transportation, or imprisonment for a term exceeding six months, has been committed. An omission to frame a charge is no ground for setting aside the conviction. Even if the omission appears to have occasioned a failure of justice, the High Court could order under s. 535 (2) that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge. **53 A. 296.**

2. Effect of failure to frame charge.—Under this section, it is not within the discretion of a Magistrate to frame a charge or not. The section is mandatory and he is *prima facie* bound to frame a charge. This section is applicable to Presidency Magistrates also except in respect of those cases falling under s. 362 (4) under which he need not frame a charge in cases in which no appeal lies. But if no objection is taken before the Magistrate as to the absence of a formal charge and if there is no failure of justice thereby, the irregularity may be cured. **A. I. R. 1932 C. 865 = 55 C. L. J. 443 = 36 C. W. N. 791 = 139 I. C. 755 = 33 Cr. L. J. 823 = 1932 Cr. C. 839.**

3. Power of Court to examine witnesses [*P. 633, n. 9*].—Section 540 gives the Court ample powers to summon any material witness at any stage of any inquiry or trial or other proceeding under the Code and once such evidence has been admitted on the record the Magistrate is bound to consider it while deciding whether a charge should or should not be framed. **A. I. R. 1933 Lah. 561 = 144 I. C. 331 = 34 P. L. R. 719 = 34 Cr. L. J. 735 = 1933 Cr. C. 819.**

SECTION 256.

Notes.—1. Applicability of section.—It is not correct to state that this section applies only where the charge is framed before all the witnesses for the prosecution are examined (1932) **M. W. N. 857 = 37 M. L. W. 134 = A. I. R. 1932 M. 559 = 5 M. Cr. C. 265 = 33 Cr. L. J. 733 = 139 I. C. 203 = 1932 Cr. C. 589.**

CROSS-EXAMINATION OF PROSECUTION WITNESSES.

2. Section does not prohibit cross-examination before charge [*P. 636, n. 5*].—Although the accused has no absolute right of cross-examination before the framing of the charge, the Magistrates would generally be exercising a proper discretion if they did permit some cross-examination at least, at that stage. *54 A. 212*. In *A. I. R. 1924 M. 735 = 81 I. C. 44 = 25 Cr. L. J. 556* it was held that no Magistrate or Court can refuse to allow an accused to cross-examine prosecution witnesses before the charge is framed, and that such a procedure is most irregular and in contravention of law. *See A. I. R. 1932 M. 559 = 1932 Cr. C. 539 = 37 M. L. W. 134 = (1932) M. W. N. 857 = 139 I. C. 203 = 33 Cr. L. J. 733 = 5 M. Cr. C. 265*. *See also 8 Luck. 135; A. I. R. 1935 Nag. 8 = 154 I. C. 369 = 1935 Cr. C. 77*. *See note to s. 252*.

3. Accused is entitled to have prosecution witnesses recalled after charge [*P. 636, n. 6*].—Where at the commencement of the trial the accused professed to take no part in it, but after the charge had been framed he changed his mind and claimed that all the prosecution witnesses should be recalled, and on the day when they were present professed his inability to cross-examine them on the ground that he had not been furnished with copies of their statements, and requested that they may be recalled for cross-examination or at least as defence witnesses, but the Magistrate declined to allow him further opportunity to examine them it was held that the Magistrate's refusal was unreasonable and prejudiced the trial of the accused. *A. I. R. 1931 Lah. 136 = 32 P. L. R. 13 = 1931 Cr. C. 306 = 32 Cr. L. J. 1292 = 124 I. C. 539*. Failure to ask the accused whether he wishes to cross-examine the prosecution witnesses, vitiates the trial (*1932) M. W. N. 857 = 37 M. L. W. 134 = A. I. R. 1932 M. 559 = 1932 Cr. C. 539 = 139 I. C. 203 = 33 Cr. L. J. 733 = 5 M. Cr. C. 265*. Even if there is a possibility of the accused having been prejudiced, the conviction should be set aside. *A. I. R. 1933 Sind 135 = 147 I. C. 392 = 1933 Cr. C. 333*. Failure to act in accordance with this section is not a mere irregularity, but an illegality. *A. I. R. 1929 Sind 151 = 30 Cr. L. J. 880 = 118 I. C. 200 = 1929 Cr. C. 319*. Where the witnesses for the prosecution already examined, are not offered for cross-examination after the framing of the charge, it will be extremely difficult to say that the accused has not thereby suffered substantial injury. The answer must depend on the facts and circumstances of each case. *A. I. R. 1929 A. 904 = L. R. 10 A. (Cr.) 151 = 31 Cr. L. J. 14 = 120 I. C. 203 = 1929 Cr. C. 436 = 13 A. I. Cr. R. 15*. It was held in *7 Luck. 699* that the provisions of this section are merely directory and are not provisions relating to the mode of trial but only lay down a rule of procedure and therefore a non-compliance with these provisions is no more than an irregularity in procedure which can be cured by s. 537.

4. Right of accused in proceedings under s. 110. [*P. 636, n. 7*].—A person proceeded against under s. 110 has no right to further cross-examine prosecution witnesses under this section. *A. I. R. 1933 Rang. 29 = 34 Cr. L. J. 463 = 142 I. C. 752 = 1933 Cr. C. 277; A. I. R. 1933 Sind 8 = 27 S. L. R. 19 = 34 Cr. L. J. 9 = 140 I. C. 170 = 1933 Cr. C. 32 = 19 A. I. Cr. R. 94; 53 M. 173*. But *see 52 A. 443* where it was held that s. 256 was applicable to inquiry into cases under s. 110 so far as practicable.

5. Accused shall be required to state at the commencement of the next hearing of the case.—Failure to record reasons for asking the accused forthwith whether he wishes to recall any of the prosecution witnesses for further cross-examination is only an irregularity which will be cured by s. 537 if no failure of justice has been occasioned thereby. *32 Bom. L. R. 536 = A. I. R. 1930 B. 241 = 31 Cr. L. J. 743 = 124 I. C. 810*. Whether the reason recorded is sufficient or not depends on the circumstances of each case. Where the reason recorded for putting the question on the same date was that the accused was undefended, there was no illegality as the Magistrate was justified in thinking that the accused, not having a Vakil and not wanting to have one was a perfectly good reason why the question might without any prejudice to him be put the same day. *A. I. R. 1930 M. 977 = (1930) M. W. N. 985 = 3 M. Cr. C. 333 = 32 Cr. L. J. 221 = 129 I. C. 74 = 1930 Cr. C. 1193*. It is not so much the recording of the reasons as the adequacy thereof, which should count in the determination of the question whether the provisions of this section have been complied with. If no good reasons are forthcoming, merely recording them in writing would not save the trial from the taint of an incurable irregularity if it results in prejudice to the accused. *A. I. R. 1930 Nag. 255 = 31 Cr. L. J. 705 = 124 I. C. 619 = 1930 Cr. C. 831*.

6. Accused entitled to adjournment for cross-examining prosecution witnesses [*P. 637, n. 12*].—The observation in *Knox, J* in *8 A. L. J. 707* that the accused was not entitled to an adjournment, was quoted with approval in *A. I. R. 1930 A. 493 = 31 Cr. L. J. 764 = 125 I. C. 32 = 1930 Cr. C. 739*. When once the prosecution witnesses have been recalled or further cross-examination as required by this section, it is open to the Court to adjourn the case on terms under s. 344(1) if the accused requires an adjournment. (*1934) M. W. N. 100*.

7. Magistrate's discretion as to the order in which prosecution witnesses should be cross-examined.

Where the defence desired to cross-examine other witnesses before cross-examining the complainant on the ground that to cross-examine the complainant beforehand would embarrass the defence, the Magistrate should exercise his discretion in favour of the defence and not insist on the complainant being cross-examined first merely on the ground that he was a sickly man and was present in Court. *A. I. R. 1933 C. 189 = 37 C. W. N. 288 = 1933 Cr. C. 235 = 142 I. C. 479 = 34 Cr. L. J. 347.*

SECTION 257.

Notes.—1. **Magistrate bound to summon defence witnesses unless he records reasons for refusing to summon** [*P. 640, n. 4*].—The Magistrate must issue summonses for the attendance of the witnesses for the defence unless he takes the responsibility of recording his ground for refusing the application for any of the reasons specified in this section. *A. I. R. 1931 Lah. 56 (2) = 31 P. L. R. 949 = 130 I. C. 816 = 1931 Cr. C. 120 = 32 Cr. L. J. 620; 1931 Cr. C. 818 = 32 Cr. L. J. 1176 = 134 I. C. 476 = A. I. R. 1931 Oudh 386 = 8 O. W. N. 791.* The mere fact that the accused has filed a long list of witnesses is no reason for refusing to summon them. A Court may be entitled to infer from the mere fact that an unduly large number of witnesses have been required to be summoned that the application has been made for the purpose of vexation or delay or for defeating the ends of justice. But where the Magistrate does not consider that the application has been made for such a purpose, he has no option but to issue process under sub-section (1). *54 A. 331; A. I. R. 1933 Lah. 1020 = 1933 Cr. C. 1557 = 147 I. C. 398.* Omission to give full effect to s. 257 (1) is an illegality and not a mere irregularity and the defect could not be cured under s. 537. But it is open to the revisional Court to direct the trial Court to comply with the provisions of law and the accused should not have any grievance after such compliance. *1930 A. L. J. 226 = A. I. R. 1929 A. 914 (2) = L. R. 11 A. (Gr.) 11 = 30 Cr. L. J. 1155 = 120 I. C. 123 = 1929 Cr. C. 642 = 13 A. I. Cr. R. 117.*

2. **Refusal to re-summon defence witnesses** [*P. 640, n. 5*].—When the Magistrate issued the process under s. 257, he undertook to compel the attendance of the witness and the defence could not be held responsible for his failure to appear. If the Magistrate considered the application for process ought to have been refused he should have refused it in the first instance, recording his reasons for the refusal. When he had once issued the process, unless on subsequent scrutiny he found that under this section he ought to have refused process, he was obliged to take every step in his power to compel the attendance of the witness subject to the provisions of sub-section (2). *A. I. R. 1931 Pat. 207 = 130 I. C. 799 = 12 P. L. T. 372 = 32 Cr. L. J. 613 = 1931 Cr. C. 528 = 16 A. I. Cr. R. 261; (1932) M. W. N. 1249.* Though once a Magistrate has summoned witnesses under this section, he is not bound to compel their attendance if he is satisfied that it is unnecessary for the purposes of justice. *A. I. R. 1930 M. 632 (1) = 3 M. Cr. C. 208 = 31 Cr. L. J. 720 = 124 I. C. 606 = 1930 Cr. C. 534.*

3. **Right to further cross-examine prosecution witnesses** [*P. 641, n. 7-A*].—The proviso to the section clearly contemplates the summoning of prosecution witnesses who have been cross examined after the charge was framed, at the defence stage and indicates that while the attendance of such witnesses should not ordinarily be compelled, there is no restriction on their examination, if present. *A. I. R. 1932 Nag. 187 (4) = 28 N. L. R. 254 = 1932 Cr. C. 746 = 33 Cr. L. J. 940 = 140 I. C. 117.* Where the accused applied at a late stage for further cross-examining a prosecution witness and the Magistrate properly exercised his discretion in refusing the application, and no grievance was made of this matter in the grounds of appeal to the Sessions Court, *held* there was no defect in the proceedings. *A. I. R. 1933 Pat. 598 = 146 I. C. 530 = 1933 Cr. C. 1360 = 35 Cr. L. J. 95.*

4. **Prosecution not entitled to adduce rebutting evidence regarding character of accused**.—In a warrant-case when the accused leads evidence of good character by way of defence, the Code does not give the prosecution the privilege of leading rebutting evidence. If the Magistrate in his discretion thinks such evidence essential to the just decision of the case he may summon it, but the prosecution cannot insist on his doing so. *A. I. R. 1930 M. 443 (2) = (1930) M. W. N. 96 = 32 M. L. W. 215 = 3 M. Cr. C. 63 = 31 Cr. L. J. 1196 = 127 I. C. 304 = 1930 Cr. C. 500 = 15 A. I. Cr. R. 156.*

5. **This section does not restrict the power of Court to compel production of documents, etc., at any stage under s. 94.**—This section neither controls nor imposes any limitation on the power of the Court to exercise its discretion in using the machinery provided by s. 94 to summon any document or other thing.

at any stage of the inquiry, trial or other proceeding. In proper cases the Court has power under s. 94 to compel the production of a document, etc., at the instance of the accused even though a charge had not yet been framed against the accused. A. I. R. 1935 Sind 13 (F. B.) = 154 I. C. 762 = 1935 Cr. C. 124.

6. Sub-sec. (2). In warrant-cases Government must ordinarily pay the expenses of witness for defence.—In a warrant-case, ordinarily it is the Government that must pay the expenses, both for the Crown and the defence. A. I. R. 1932 Lah. 481 = 1932 Cr. C. 619 = 33 P. L. R. 811 = 139 I. C. 503 = 33 Cr. L. J. 761. There should be strong and cogent reasons for departing from this rule. A. I. R. 1929 Lah. 23 (2) = 30 Cr. L. J. 814 = 117 I. C. 667. The complainant cannot be compelled to pay process fees for witnesses whom the accused desires to cross-examine after the charge is framed. (1933) M. W. N. 1266. Where the Magistrate had summoned the prosecution witnesses and they were present in Court, the Magistrate is not justified in refusing to allow them to be cross-examined unless the accused paid their expenses. A. I. R. 1929 Lah. 578 = 30 Cr. L. J. 380 = 115 I. C. 76 = 1929 Cr. C. 152.

7. Fees must be fixed by Magistrate.—It is the duty of the Magistrate to fix the fees for witnesses and he cannot leave it to the parties to negotiate with the witnesses and fix their fees. A. I. R. 1932 Lah. 481 = 1932 Cr. C. 619 = 33 P. L. R. 811 = 139 I. C. 503 = 33 Cr. L. J. 761.

SECTION 258.

Notes.—1. If the Magistrate finds the accused not guilty he shall record an order of acquittal.—Where the accused was charged under s. 323, I. P. C. the mere fact that on an adjourned date neither the complainant nor the accused appeared, did not warrant an order of acquittal being passed under this section after a charge has been framed. 37 C. W. N. 712 = A. I. R. 1933 C. 353 (1) = 1933 Cr. C. 494 = 143 I. C. 83 = 34 Cr. L. J. 498.

2. Discharge after charge amounts to acquittal [P. 643, n. 3].—A nominal order of discharge after a charge is framed will operate as an order of acquittal. A. I. R. 1933 Lah. 323 = 34 P. L. R. 131 and 680 = 1933 Cr. C. 585 = 144 I. C. 239 = 34 Cr. L. J. 713.

3. Passing sentence on conviction [P. 643, n. 6].—Both sections 245 and 258 are mandatory and the Magistrate has no option but must pass sentence according to law if he finds the accused guilty of the offence with which he is charged. 12 Rang. 419.

4. In passing sentence Magistrate need not consider previous convictions outside British India.—The question of sentence is always within the discretion of the Court and is ordinarily determined only with regard to the facts and circumstances of the case unless there is a liability to enhanced punishment by a specific provision of law like s. 75, I. P. C. But the Magistrate is not bound to consider previous convictions of the accused out of British India in determining the sentence even though it might have been open to him to consider them. 63 M. L. J. 176 = 41 M. L. W. 184.

SECTION 259.

Notes.—1. Discharge of accused owing to absence of complainant improper when case is called only to be further adjourned.—If a case is only nominally fixed for hearing to a certain date, when it cannot reasonably be expected to be reached and is not in fact reached during that day, the mere unexplained absence of a complainant, when the case is called on for the purpose of fixing a new date is not either under s. 247 or under s. 259 a good ground for taking action under those sections. 36 Bom. L. R. 105 = A. I. R. 1934 B. 130 = 35 Cr. L. J. 1139 = 150 I. C. 858 = 1934 Cr. C. 475 = 21 A. I. Cr. R. 316.

2. Procedure when complainant absent after charge is framed [P. 644, n. 7].—If the complainant and his witnesses do not appear after the charge is framed it is open to the Magistrate either to adjourn the case or he should find the accused "not guilty" and acquit him under s. 258 (1). The accused should not be discharged. 53 A. 39.

3. Discharge of accused under this section not a bar to a fresh complaint being entertained [P. 644, n. 10].—A discharge under this section in a warrant-case is no bar to a further prosecution on the same facts. A. I. R. 1934 Nag. 215 = 36 Cr. L. J. 57 = 152 I. C. 223 = 1934 Cr. C. 986.

4. Restoration [P. 644, n. 10-A].—A Magistrate who has discharged an accused person under s. 259 can restore the case to file if sufficient cause is shown in cases in which the trial had been completed. But if the trial has not been held he has no power to set aside his own order of discharge. He can only entertain another complaint on the same facts, if he sees fit. 1933 M. W. N. 1429.

CHAPTER XXII.

OF SUMMARY TRIALS.

SECTION 260.

Notes.—1. Jurisdiction determined by the nature of complaint [*P. 646, n. 10*].—The jurisdiction of the Court to try summarily a case prosecuted by the police is derived from the nature of the charge prepared by the police. Where the police prosecuted for theft of property not exceeding Rs. 50 and the Magistrate convicted the accused of theft of property not exceeding Rs. 50, there is no defect in the jurisdiction of the Magistrate to try the case summarily. Any exaggeration as to the nature of the offence should have no effect on the jurisdiction. 53 A. 218.

2. Magistrate acts without jurisdiction in reducing a grave offence into a minor offence so as to try it summarily [*P. 646, n. 11*].—It is settled law that a Magistrate acts without jurisdiction if he reduces a grave offence to a minor one with a view to give himself jurisdiction to try the case summarily. 15 Lah. 610.

3. Offences triable summarily [*P. 648, n. 18*].—*Offences under the Child Marriage Restraint Act, 1929 = Act XIX of 1929*—Offences under ss. 4 and 5 of the Child Marriage Restraint Act, 1929 are triable summarily under sub-sec. (1) (a) of the Code, as they are "offences not punishable with imprisonment for a term exceeding six months." A. I. R. 1934 A. 331 = 1934 A. L. R. 387 = 35 Cr. L. J. 677 = 143 I. C. 351 = 1934 Cr. C. 414.

4. Under what circumstances summary trial undesirable, though legal [*P. 649, n. 20*].—A summary trial is intended to be directed towards offences which are appropriate for such form of trial. While it may be legal to use that procedure in a particular case, it does not follow that it is desirable. An offence which may seem very grave from the point of view of the section applicable, may really be of a trivial nature. On the other hand the consequences following upon conviction of what is itself a trivial offence may be so grave as to render a summary trial unsuitable. A. I. R. 1929 A. 287 (2) = L. R. 10 A. (Cr.) 73 = 30 Cr. L. J. 505 = 115 I. C. 614 = 11 A. I. Cr. R. 503.

Government servants. [*N. 20 (i)*].—Summary procedure though legal is most inappropriate in cases in which Government servants, no matter what their rank, are concerned as accused persons. A. I. R. 1932 Lah. 188 = 33 P. L. R. 177 = 33 Cr. L. J. 103 = 135 I. C. 220 = 1932 Cr. C. 181 = 17 A. I. Cr. R. 233.

5. Clause (f). Value of property not to exceed fifty rupees in respect of each offence.—If more than one offence of receiving or retaining stolen property is by application of s. 234 tried at one summary trial, the aggregate value of the property in respect of the separate offences should not be taken into account, but only the value of the property in respect of each separate offence. S. 234 does not permit three offences being lumped together but only permits the trial of three separate offences at the same trial. A. I. R. 1934 Sind 185 = 1934 Cr. C. 1392.

SECTION 262.

Notes.—1. Procedure in summary trial of warrant-cases [*P. 651, n. 1*].—S. 256 applies only to cases where a charge is framed. In a summary trial, if no formal charge is framed, and the accused is not required to plead in respect of it, he is not entitled to claim, as of right the opportunity of recalling prosecution witnesses for further cross-examination. 7 Luck. 699. But see A. I. R. 1930 Sind 146 = 24 S. L. R. 336 = 31 Cr. L. J. 683 = 124 I. C. 370 = 1930 Cr. C. 529.

2. Whether aggregate sentence of more than three months proper.—The intention of sub-section (2) is to restrict the passing of sentences of imprisonment of considerable length in a summary trial from a conviction in which the right of appeal is greatly restricted and the object of the clause would be defeated if it were possible to combine a number of separate charges in one trial and then inflict a sentence of three months' imprisonment on each charge and order such sentences to run consecutively. 12 Rang. 122. It was however held in A. I. R. 1934 Sind 185 = 1934 Cr. C. 1392 that a separate sentence to the extent of three months may be passed for each separate conviction and when a person was convicted at one trial for two or more offences, it was incumbent upon the Court to pass a separate sentence for each offence.

SECTION 263.

Notes.—1. The record must show necessary ingredients of offence are established [*P. 652, n. 1*].—If a Magistrate tries a case summarily he must at least take care to see that the record shows that the necessary ingredients of the offence are established. *A. I. R. 1931 Lah. 33 = 1931 Cr. C. 97 = 32 P. L. R. 52 = 130 I. C. 425 = 32 Cr. L. J. 532 = 16 A. I. Cr. R. 5; 10 Lah. 231.*

2. Record must be sufficiently exact and sufficiently full to enable the revisional Court to say whether the law has been complied with or not on the points to be recorded [*P. 653, n. 2*].—The offence charged, the offence if any, proved and the reasons for convicting must be recorded in such a way as to enable the Court of Revision to say aye or no from within the four corners of the record itself whether the offence charged is an offence in point of law, whether the offence proved is an offence in point of law and whether the reasons for the conviction are good and sufficient reasons. Where in the column relating to the description of the offence the only entry was “5 I. M. V. Act.” held that s. 5 of the Indian Motor Vehicles Act creates four distinct offences and that there was nothing to show the nature of the offence with which accused was charged and of the precise nature of which he had a right to be informed. *15 Lah. 277; A. I. R. 1930 Lah. 481 = 31 P. L. R. 576 = 32 Cr. L. J. 50 = 127 I. C. 849 = 1930 Cr. C. 593.* The record should be such that a superior Court acting in revision may be in a position to judge whether there was sufficient material before the Magistrate to support the conviction. *7 Luck. 498.*

3. Brief reasons for conviction should be recorded [*P. 653, n. 3*].—Where the Magistrate simply wrote “I believe the prosecution” held that this was only a conclusion and not a reason and there has been no compliance with the provisions of the section. The record however brief, must state the necessary ingredients of the offence of which the accused has been found guilty. *15 Lah. 277; A. I. R. 1929 Lah. 378; (1933) M. W. N. 736.* The Magistrate in a summary trial passed an order of acquittal as follows: “That at best it is a case in which the accused are entitled to the benefit of doubt and the accused are therefore acquitted.” Held that it was no judgment in the eye of the law and the manner of disposal was a gross abuse of the powers conferred under s. 260. *A. I. R. 1934 Oudh 177 (2) = 1934 O. L. R. 306 = 11 O. W. N. 487 = 35 Cr. L. J. 677 = 148 I. C. 430 = 1934 Cr. C. 585.*

4. Clause (g). The plea of the accused and his examination (if any).—The words “if any” do not imply that it is optional to the Magistrate to examine the accused or not, but merely imply that where the accused has made a statement, particulars of his examination should be noted. But the mere omission to note such particulars is only an irregularity which can be cured under s. 537, unless the defect has in fact occasioned a failure of justice. *A. I. R. 1935 A. 217 = 1935 A. L. J. 257 = 1935 Cr. C. 260.*

5. Whether any memorandum of evidence made by the Court should form part of the record.—Sections 355 and 356 as to the mode of recording evidence in summons and warrant-cases have no application to a summary trial under this chapter. If a Magistrate or Bench of Magistrates in a summary trial elect to take notes or make a memorandum of the testimony of the witnesses they do so for their own convenience and such notes or memoranda form no part of the record of the case. *13 Rang. 225 dissenting from 48 C. 280.*

SECTION 264.

Note.—Contents of the judgment in appealable cases [*P. 654, n. 1*].—The substance of the evidence is a matter distinct from the facts which may be considered as proved by the evidence. The substance of the evidence should be recorded in such a manner that a superior Court acting in appeal or revision may be in a position to judge that there were sufficient materials before the Magistrate to support the conviction. *A. I. R. 1929 Oudh 151 = 6 O. W. N. 45 = 30 Cr. L. J. 557 = 116 I. C. 57 = 12 A. I. Cr. R. 437.* Considering that the Court is not required to record any evidence at all and that therefore there is no test by which the substantiality of its record can be gauged, it is to be assumed that the matter rests with the Court. Where a case is hotly contested, it is questionable whether the Magistrate is well advised to try it summarily. *A. I. R. 1931 M. 283 (1) = (1931) M. W. N. 118 = 33 M. L. W. 311 = 4 M. Cr. C. 92 = 1931 Cr. C. 329 = 131 I. C. 174 = 32 Cr. L. J. 689 = 16 A. I. Cr. R. 330.*

SECTION 265.

Notes.—1. Judgment should be signed and not merely initialed.—A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment and the mere putting in of initials is not a sufficient compliance with the mandatory provisions of this section. The defect vitiates the conviction and sentence. 54 M. 252.

2. Judgment should be signed by all the members.—By whomsoever the judgment and record may have been written, the intention is that they shall be signed by all the members present. But the mere omission to comply with this requirement of law is only an irregularity to which s. 537 applies. 53 M. 165.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

SECTION 266.

Amendment.—(1) After the word “includes” the words “the Chief Court of Oudh” shall be inserted and the word “Oudh” after the word “Provinces” shall be omitted—**Act XXXII of 1925.**

(2) (i) For the words “Court of Oudh” the words “Courts of Oudh and Sind” shall be substituted; and

(ii) For the words “Courts of the Judicial Commissioners of the Central Provinces and Sind” the words “Court of the Judicial Commissioner of the Central Provinces” shall be substituted—**Act XXXIV of 1926.**

The result of the above amendments is to substitute for the words “and includes the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind” the words “and includes the Chief Courts of Oudh and Sind and the Court of the Judicial Commissioner of the Central Provinces.”

SECTION 268.

Note.—Judge not to make local inspection without the Jurors or Assessors.—Under this section the jury or assessors form an integral part of the Court and any proceedings taken by the Judge in the absence of the jurors or assessors, are necessarily void and illegal. Where the Judge made a local inspection of the place of occurrence without the assessors, his note of inspection was held inadmissible. A. I. R. 1934 Oudh 499 = 11 O. W. N. 1309 = 1934 O. L. R. 810 = 35 Cr. L. J. 1496 = 152 I. C. 103 = 1934 Cr. C. 1379.

SECTION 269.

Amendment.—In sub-section (1) the words “with the like sanction” shall be omitted—**Act X of 1927.**

Notes.—1. Procedure where some of the charges are triable by jury and some with the aid of assessors [P. 657, n. 4].—In a case where the accused persons are being jointly tried by jury and by the Judge with the aid of assessors, it is competent for the Judge to take into consideration the entire evidence produced in the case in dealing with the charge triable by him with the aid of assessors, in spite of the fact that that evidence may have been disbelieved by the jury who were dealing with the minor charge. A. I. R. 1934 A. 61 = 1934 A. L. J. 852 = 1934 Cr. C. 130 = 151 I. C. 442 = 35 Cr. L. J. 1349. Where the accused was charged with offences under s. 302, I. P. C. triable by jury and s. 201, I. P. C. triable with the aid of assessors and the jury found the accused not guilty under s. 302 and as assessors they were also of opinion that he was not guilty under s. 201, it is open to the Judge while acquitting the accused under s. 302 to convict him under s. 201 disagreeing with the assessors notwithstanding that his view differed from that taken by the jury on substantially the same evidence. A. I. R. 1935 B. 165 = 37 Bom. L. R. 109.

Where the accused was tried under s. 395, I. P. C. by jury and under s. 396, I. P. C. with the aid of assessors and the Judge in his summing up had gone over the whole ground in respect of both the charges and accepting their verdict as jurors acquitted the accused under s. 395 and agreeing with their opinion as assessors convicted the accused under s. 396 without writing out a separate judgment, *held* the failure to write a separate judgment was not illegal. The summing up satisfied all the requirements of a judgment and nothing would be gained by repeating the same remarks in two separate documents. **4 Luck. 721.**

2. Trial by jury of case triable with the aid of assessors [*P. 658, n. 7*].—Where offences of rioting were excluded from jury trial and the charge was under s. 325/149, I. P. C. and the essential part of the charge was rioting, the case is not triable by jury though an offence under s. 325 is so triable. Though s. 536 cures the defect, where the Judge summed up the case as if he was charging a jury, the trial was vitiated by misdirection. As the case should be deemed to have been tried with assessors an appeal therefrom can be heard on questions of fact. **55 A. 63.**

SECTION 271.

Notes.—1. Plea of guilty not a confession [*P. 660, n. 7*].—A plea of guilty under s. 271 (2) is not a confession such as is dealt with in the Evidence Act in respect of relevance or irrelevance. It is a statement which, if, accepted by the Court, amounts to a waiver on the part of the accused of trial, in which alone a confession might be utilized in evidence. **A. I. R. 1934 Pat. 330 = 35 Cr. L. J. 1322 = 151 I. C. 393 = 1934 Cr. C. 722.**

2. Plea of guilty—Court need not necessarily convict accused [*P. 661, See note 15*].—This section seems to mean that where the accused pleads guilty, the Court need not necessarily record a conviction against him. His plea shall be recorded and in a suitable case the Court may leave the matter there and discharge him. He cannot however be tried. **58 C. 1214.**

3. In capital cases, desirable not to accept plea of guilty [*P. 662, n. 16*].—Although it is discretionary with a Sessions Judge to accept or not a plea of guilty it would not be proper discretion to accept such a plea in a case of murder or culpable homicide not amounting to murder unless the facts are clear. **A. I. R. 1934 Sind 204 = 153 I. C. 238 = 1934 Cr. C. 1410.**

4. Procedure if plea of guilty not accepted [*P. 662, n. 18*].—Section 271, seems to give the Judge a discretion when the accused pleads guilty to accept the plea or not. But if the plea be not accepted there seems to be no sense in recording it, and if it be not accepted there is no provision in the Code for proceeding with the trial because s. 272 does not apply where the accused has pleaded guilty. The section seems to mean that if the accused pleads guilty the Court need not necessarily record a conviction against him. The practice sometimes adopted in India where there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused under s. 30, Evidence Act, is illegal and an abuse of the process of the Court. Where an accused person pleads guilty he is not on trial and cannot be tried. **58 C. 1214 following 22 M. 491; 17 A. 524; 23 A. 53; 30 A. 540; 19 B. 195** and the judgment of *Sir Arnold White, C.J.* in **25 M. 61** and *dissenting from 23 M. 151; 10 Cr. L. J. 64 and **18 Cr. L. J. 742**. But in (1933) **M. W. N. 83** it was held *dissenting from 58 C. 1214* that under the terms of s. 271 the Court has got a discretion when it does not feel justified in accepting a plea of 'guilty,' of directing that an accused should be tried.*

5. If plea is accepted—it is desirable to pass sentence completely before calling on accused to give evidence against co-accused.—It is always desirable to pass sentence completely before calling one accused in a joint trial to give evidence against his co-accused so that the witness may give his evidence with a mind free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. **58 C. 1214.**

6. Plea of guilty—Court may question accused as to voluntary nature of plea.—Where the accused filed a written application containing a plea of guilty it is proper for the Judge to make quite certain that the petition emanated from the accused themselves and represented their own wishes. S. 342 does not prohibit the questioning of the accused on matters other than those appearing in the evidence against him. Even if there is an irregularity in so questioning the accused, it is cured by s. 537. **A. I. R. 1934 Pat. 330 = 35 Cr. L. J. 1322 = 151 I. C. 393 = 1934 Cr. C. 722.**

7. Accused may plead guilty in the course of trial.—It is open to the accused in the course of the trial to withdraw his claim to be tried and plead guilty and the Court is entitled to record the plea and either accept it or continue the trial. **A. I. R. 1934 Pat. 330 = 35 Cr. L. J. 1322 = 151 I. C. 393 = 1934 Cr. C. 722.**

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Notes.—1. **Judgment should be signed and not merely initialled.**—A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment and the mere putting in of initials is not a sufficient compliance with the mandatory provisions of this section. The defect vitiates the conviction and sentence. 54 M. 252.

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CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

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Amendment.—In sub-section (1) the words “with the like sanction” shall be omitted—**Act X of 1927.**

Notes.—1. **Procedure where some of the charges are triable by jury and some with the aid of assessors** [P. 657, n. 4]—In a case where the accused persons are being jointly tried by jury and by the Judge with the aid of assessors, it is competent for the Judge to take into consideration the entire evidence produced in the case in dealing with the charge triable by him with the aid of assessors, in spite of the fact that that evidence may have been disbelieved by the jury who were dealing with the minor charge. A. I. R. 1934 A. 61 = 1934 A. L. J. 852 = 1934 Cr. C. 130 = 151 I. C. 442 = 35 Cr. L. J. 1349. Where the accused was charged with offences under s. 302, I. P. C. triable by jury and s. 201, I. P. C. triable with the aid of assessors and the jury found the accused not guilty under s. 302 and as assessors they were also of opinion that he was not guilty under s. 201, it is open to the Judge while acquitting the accused under s. 302 to convict him under s. 201 disagreeing with the assessors notwithstanding that his view differed from that taken by the jury on substantially the same evidence. A. I. R. 1935 B. 165 = 37 Bom. L. R. 109.

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SECTION 271.

Notes.—1. Plea of guilty not a confession [*P. 660, n. 7*].—A plea of guilty under s. 271 (2) is not a confession such as is dealt with in the Evidence Act in respect of relevance or irrelevance. It is a statement which, if, accepted by the Court, amounts to a waiver on the part of the accused of trial, in which alone a confession might be utilized in evidence. **A. I. R. 1934 Pat. 330 = 35 Cr. L. J. 1322 = 151 I. C. 393 = 1934 Cr. C. 722.**

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3. In capital cases, desirable not to accept plea of guilty [*P. 662, n. 16*].—Although it is discretionary with a Sessions Judge to accept or not a plea of guilty it would not be proper discretion to accept such a plea in a case of murder or culpable homicide not amounting to murder unless the facts are clear. **A. I. R. 1934 Sind 204 = 153 I. C. 288 = 1934 Cr. C. 1410.**

4. Procedure if plea of guilty not accepted [*P. 662, n. 18*].—Section 271, seems to give the Judge a discretion when the accused pleads guilty to accept the plea or not. But if the plea be not accepted there seems to be no sense in recording it, and if it be not accepted there is no provision in the Code for proceeding with the trial because s. 272 does not apply where the accused has pleaded guilty. The section seems to mean that if the accused pleads guilty the Court need not necessarily record a conviction against him. The practice sometimes adopted in India where there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused under s. 30, Evidence Act, is illegal and an abuse of the process of the Court. Where an accused person pleads guilty he is not on trial and cannot be tried. **58 C. 1214 following 22 M. 491; 17 A. 524; 23 A. 53; 30 A. 540; 19 B. 195** and the judgment of *Sir Arnold White, C.J.* in **25 M. 61** and *dissenting from 23 M. 181; 10 Cr. L. J. 64 and **18 Cr. L. J. 742.** But in (1935) **M. W. N. 83** it was held *dissenting from 58 C. 1214* that under the terms of s. 271 the Court has got a discretion when it does not feel justified in accepting a plea of 'guilty,' of directing that an accused should be tried.*

5. If plea is accepted—it is desirable to pass sentence completely before calling on accused to give evidence against co-accused.—It is always desirable to pass sentence completely before calling one accused in a joint trial to give evidence against his co-accused so that the witness may give his evidence with a mind free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce. **58 C. 1214.**

6. Plea of guilty—Court may question accused as to voluntary nature of plea.—Where the accused filed a written application containing a plea of guilty it is proper for the Judge to make quite certain that the petition emanated from the accused themselves and represented their own wishes. S. 342 does not prohibit the questioning of the accused on matters other than those appearing in the evidence against him. Even if there is an irregularity in so questioning the accused, it is cured by s. 537. **A. I. R. 1934 Pat. 330 = 35 Cr. L. J. 1322 = 151 I. C. 393 = 1934 Cr. C. 722.**

7. Accused may plead guilty in the course of trial.—It is open to the accused in the course of the trial to withdraw his claim to be tried and plead guilty and the Court is entitled to record the plea and either accept it or continue the trial. **A. I. R. 1934 Pat. 330 = 35 Cr. L. J. 1322 = 151 I. C. 393 = 1934 Cr. C. 722.**

SECTION 272.

Note.—Jury cannot try two cases simultaneously [*P. 664, n. 4*].—Subject to the right of the accused to object to the jury or any one or more of its members, the same jury may try any number of accused persons one after the other. But there is no provision in the Code for trying two cases at the same time before the same jurors. 54 C. L. J. 146 = 1931 Cr. C. 989 = 32 Cr. L. J. 1233 = 134 I. C. 896 = A. I. R. 1931 C. 709.

SECTION 275.

Notes.—1. **Who is an European?**—If a person is found to be an "European British subject" as defined in s. 4 (1) (i) that fact is sufficient to bring him within the category of "European" referred to in this section. 13 Pat. 177.

2. **Trial invalid if majority of jurors are not constituted as required by the section.**—Where an European British subject claimed to be tried under the provisions of Chapter XXXIII and only two out of five jurors were found to be Europeans or Americans, the trial was invalid. 13 Pat. 177.

SECTION 276.

Notes.—1. **Selection of jurors from outsiders in case of deficiency** [*P. 666, n. 2-A*].—It is the duty of the Judge to consider whether it is practicable to have nine jurors and there is no duty cast upon the accused to show that the Court did not consider the practicability of having nine jurors. Where the Judge never applied his mind to the provisions of section 274, the jury was not properly constituted and the illegality vitiated the whole trial. A. I. R. 1931 C. 178 (F. B.) = 128 I. C. 811 = 32 Cr. L. J. 190 = 1931 Cr. C. 242 = 15 A. I. Cr. R. 392 = 34 C. W. N. 1154; 51 C. L. J. 578 = A. I. R. 1930 C. 716 = 34 C. W. N. 735 = 1930 Cr. C. 1116. Where at the end of the ballot the jury is found to be short of the required number, it is entirely for the Judge to exercise his discretion as to whether to adjourn the trial or to proceed with it with the aid of jurors chosen from persons present in Court after satisfying himself as to the social status and fitness of those persons. 34 C. W. N. 1154 (F. B.) = A. I. R. 1931 C. 178 = 128 I. C. 811 = 32 Cr. L. J. 190 = 1931 Cr. C. 242 = 15 A. I. Cr. R. 392. Objection, if any, to the choosing of jurors, from outsiders should be taken at the time and not towards the end of the trial. A. I. R. 1932 C. 750 (2) = 1932 Cr. C. 744 = 33 Cr. L. J. 869 = 140 I. C. 18.

The second proviso to the section does not mean that from the persons present, a number equal to the deficiency in the number of jurors summoned should be chosen and the choice from them should be made by lot. "Chosen" simply means "selected." The deficiency refers to the number required to form the quorum. The word "Jurors" in the proviso mean actual jurors and not potential jurors and the number of jurors required therefore, means the number required to make up the quorum under s. 274. 56 A. 210. Proviso (2) applies also to deficiency in the case of special jurors. The word "Jurors" in proviso (2) is a general term, meaning both special and common jurors. S. 276, and the following sections 277, 278 and 279 must be read together as prescribing the procedure for empanelling jurors. The reference in section 279 (2) is to the whole of s. 276 and there is nothing to show that proviso (4) to that section is excluded. 58 C. 1272; 60 C. 725. See A. I. R. 1935 C. 407.

2. **What is meant by "such other persons as may be present."**—The legislature did not intend that the persons must be actually within the Court room. Persons who are within the precincts of the Court building either because they have been summoned for other cases or by mere chance, are persons "present" within the meaning of this section. The intention of the Legislature was to prevent individuals being summoned from the locality. 59 C. 1123. Their Lordships observed in the above decision that the use of the word "bystanders" by *Buckland, J.* in 55 C. 371 (F. B.) was not of any assistance in considering this point as the Full Bench Case was concerned with a totally different question and there was no need to construe the word "present" in the second proviso. The words "from such persons as may be present" cannot be held to mean that it was the duty of the Judge to send his Court officers to search for jurors in adjacent Sessions Courts: Where the number of jurors present were less than nine and there were no other jurors present in Court, the Judge is entitled to constitute a jury of seven under s. 274. 61 C. 190.

3. **Deficiency how to be ascertained.**—The proper procedure is that the names of all the persons summoned irrespective of whether they have attended or not should be put into the ballot-box and as each name is drawn out and called, the accused must be asked whether he objects to be tried by that juror. When

objections are made and allowed and the places of the challenged jurors supplied, it will be known whether there is a deficiency as mentioned in the second proviso. The deficiency is to be discovered only by this method and not by any ascertainment beforehand. 56 A. 210.

SECTION 278.

Note.—Objection on the ground of juror not knowing English.—A juror not knowing English is incompetent to act as a juror and the effect of the incompetence of a juror is to deny to the accused an essential part of the protection afforded to him by law and the result of a trial in such a case is a clear miscarriage of justice. The question whether a juror is competent for physical or other reasons to understand the proceedings, is not a question which invades the privacy of the discussions in the jury-box or in the retiring room. It does not seek to inquire into the reasons for a verdict. The alleged defect of the juror could therefore be proved by the evidence of the juror himself. Finality of a verdict is a good thing, but justice is a better. According to ordinary procedure the accused has a right to challenge either peremptory or for cause and it may very well be that if, knowing the alleged defect, he stands by and takes his chance of a verdict, he is precluded from thereafter taking the objection. But if the cause of objection is in fact unknown to him, there is no reason why the Court should not give effect to it. 60 I. A. 354 = 12 Pat. 811 (P. C.) reversing A. I. R. 1932 Pat. 302. Where the jury were chosen by lot, but from among those so chosen the Judge proceeded to select persons knowing English, the Judge did not exceed his inherent powers for ensuring a fair trial. He did not thereby infringe in any way the provisions of s. 278. A. I. R. 1930 C. 437 = 51 C. L. J. 352 = 129 I. C. 834 = 1930 Cr. C. 745.

SECTION 279.

Note.—The second proviso to s. 276 regarding the selection of jurors from outsiders in case of deficiency is also applicable to special jurors. See note 1 to s. 276.

SECTION 282.

Notes.—1. Inherent power [P. 671, n. 1-A]—Where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge a jury and empanel another. This power is not covered by any provision in the Code, but where a case arises which demands interference and is not specifically provided for by the Code, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. It is for the Judge to determine whether there was such misconduct as to necessitate a discharge and his decision is not open to review. 61 C. 498; 56 C. 150.

2. Discharge of jury after verdict.—In England the Judge has the power to discharge the jury, if necessity arises, before or after the verdict, and in the absence of any provision to the contrary in the Indian Statute relating to procedure, a rule recognized under the English law which is not a mere rule of practice and procedure, but a rule embodying a principle of justice may safely be applied. Where after the verdict was given, it appeared that when the jurors retired for deliberation after the Judge's summing up, one of the jurors had without the leave of the Court separated from the rest of the jury and went away to say his prayer, held the Judge had power to discharge the jury and order a fresh trial. 61 C. 498. Where the jury returned a verdict of guilty against some of the accused and a verdict of not guilty against others and the foreman of the jury was subsequently convicted of having taken a bribe in connection with the trial, the conviction of the persons found guilty could not be sustained. 60 C. 731.

SECTION 286.

Notes.—1. In opening case prosecutor should give names of witnesses not previously examined [P. 676, n. 5]—There is nothing in the Code which requires the Sessions Court to refuse to hear any witness whom the Public Prosecutor may have in readiness. The Code does not command the Sessions Court to close its case against any person who has relevant evidence to give and who stands ready to give it, merely because, in the proceedings before commitment, his testimony was not available. A. I. R. 1934 Sind 78 (2) = 35 Cr. J. 1170 = 150 I. C. 917 = 1934 Cr. C. 737. But when the prosecution proposes to examine new witnesses

the prosecuting counsel should always mention in his opening address the names of the new witnesses and the purposes for which they are being called and the Court should always insist upon this being done. Copies of the proofs or at least a summary of the evidence which a new witness is expected to give should be furnished by the prosecution within a reasonable time to the accused, free of cost, before a new witness is examined 36 Bom. L. R. 950 = A. I. R. 1934 B. 487 = 153 I. C. 278 = 1934 Cr. C. 1413.

2. Prosecution should produce all available witnesses [P. 676, n. 6]—In a capital case it is the duty of the Public Prosecutor to place before the trial Court the testimony of all available witnesses. The prosecution should not be left the option to choose and the Court should have the whole of the material evidence of all eye-witnesses whether in favour of or hostile to the prosecution, so as to form its own opinion upon the entire evidence. 8 Pat. 625.

SECTION 288.

Notes.—1. Section applies only when the witness is “produced and examined [P. 680, n. 6]—The statement made by a person before the committing Magistrate can be transferred to the record of the Sessions Judge only if the person is examined as a witness before the Sessions Judge. The statement might be admitted without examining the witness under s. 33, Evidence Act, but then the Judge should hold that the witness was incapable of giving evidence. A. I. R. 1934 Lah. 212 = 35 P. L. R. 75 = 1934 Cr. C. 447 = 147 I. C. 234 = 35 Cr. L. J. 349. The whole of the previous statement should be treated as evidence and not only portions of it and it should be brought on record after giving notice to the prosecution and to the defence. A. I. R. 1929 Nag. 233 = 30 Cr. L. J. 333 = 114 I. C. 609 = 1929 Cr. C. 257.

2. Statements let in under this section may be treated as substantive evidence [P. 683, n. 17-18]—Under this section as now amended, it is competent to a Court of Session, if it considers that the evidence given by the witnesses before it is false, whilst the evidence given by the same witnesses in the committing Magistrate's Court was true, to act upon the evidence given before the Magistrate in preference to that given before itself. Such evidence may be treated as part of the case for the prosecution. 11 Rang. 4; (1935) M. W. N. 82; A. I. R. 1930 A. 746 = 1930 A. L. J. 1105 = L. R. 12 A. (Gr.) 1 = 32 Cr. L. J. 152 = 123 I. C. 593 = 1930 Cr. C. 1002 = 14 A. I. Cr. R. 497; 9 Pat. 592. The deposition made before the committing Magistrate put in under s. 288 is substantive evidence in the case and stands on the same footing as the deposition in the Sessions Court. 60 C. 1339; 15 Lah. 765. But s. 288 does not prescribe the value or weight to be attached to such evidence when it is admitted by the Court of Session at the trial of the case. Where there is nothing to show that the witnesses have become hostile or won over by the accused, there must be independent corroboration of the truth of the statements made before the committing Magistrate and there must be sufficient reason for preferring that evidence to the evidence of the same witnesses made before the Court of Session. A. I. R. 1934 Oudh 182 = 11 O. W. N. 508 = 1934 O. L. R. 405 = 35 Cr. L. J. 797 = 148 I. C. 937 = 1934 Cr. C. 578. It is a matter for the exercise of judicial discretion whether in the circumstances of a given case, statements made in the committing Court can be used as substantive evidence and that discretion will be properly exercised if there is some independent corroborative evidence to show that the earlier statements are more likely to be true than the later. (1934) M. W. N. 1223; When the statement in the committing Magistrate's Court is opposed to the evidence given by the witness in the Sessions Court, the statement should be put to the witness and he must be given an opportunity of explaining or reconciling his statement if he can do so. A. I. R. 1930 Pat. 338 = 129 I. C. 666.

SECTION 289.

Note.—Sub-sec. (2) applies only when there is no evidence [P. 686, n. 5]—Where there is some evidence in the case it is for the jury to say whether or how far the evidence is to be believed and it is not correct to say that the matter could be left to the jury only if the evidence relating to it is satisfactory, trustworthy and conclusive. 10 Pat. 140.

SECTION 290.

Note.—In joint trials Counsel should be heard after the whole of the defence evidence is over.—This section contemplates that where there are more accused than one, their Counsel should all be heard after the conclusion of the whole of the defence evidence. It is irregular (though not forbidden by the Code) to ask Counsel for each accused to sum up his case after the evidence for his own client has concluded. A. I. R. 1932 Lah. 103 = 33 P. L. R. 891 = 135 I. C. 209 = 1932 Cr. C. 123 = 33 Cr. L. J. 97.

SECTION 291.

Notes.—1. Refusal to summon witness on the ground that it would be inconvenient to adjourn the case, is improper [*P. 688, See n. 2*].—Under this section the accused is entitled as of right, to have the witnesses named by him in the list delivered to the committing Magistrate, examined on his behalf. The intention of the Legislature is to cast on the Crown the charge of securing the attendance of witnesses whom the accused intimates to examine on his behalf at the trial. If the witnesses are not present, their attendance has to be secured by some means by the Crown. The examination of such a witness cannot be refused by the Sessions Judge merely on the ground that it would be inconvenient to adjourn the case in order to secure the attendance of the witness. 58 C. 412.

2. Judge has power to summon witnesses other than these named by the accused, if he applies [*P. 688, n. 3*].—An accused person cannot ask as of right that newly named witnesses shall be summoned for his defence, but his prayer would not ordinarily be refused if there were time to secure the attendance of the witnesses before the conclusion of the trial. A. I. R. 1933 Pat. 559 = 1933 Cr. C. 1259. Where the prosecution summoned a hand-writing expert who gave evidence in favour of the prosecution and the accused then applied to summon another expert on his behalf, the Court should exercise its discretion in favour of the accused and summon the witness, for the accused could not have known when giving in the list under s. 211 that the evidence of the expert called by the Crown would be against him. 1934 A. L. J. 67 = A. I. R. 1934 A. 372 = 1934 A. L. R. 367 = 3 A. W. R. 241 = 35 Cr. L. J. 591 = 147 I. C. 1197 = 1934 Cr. C. 437.

SECTION 292.

Notes.—1. Accused has right of reply when no oral evidence has been let in by him [*P. 689, n. 1*].—The conflict of opinion whether the defence has lost its right of reply merely by putting in some papers through a witness for the prosecution in the course of ordinary cross-examination has been set at rest by the Legislature by using the words “adduces any oral evidence” in s. 292 (a) instead of the words “adduces any evidence” in the previous enactment. The right of reply depends under the present law on the accused adducing oral evidence in defence after the close of the prosecution case and the mere fact of his having proved certain documents through a prosecution witness in cross-examination did not deprive him of his right of reply. 13 Lah. 172.

2. Erroneous decision as to right of reply is not an illegality.—An erroneous decision as to the right of reply is not an illegality or such a substantial irregularity as to vitiate the whole proceedings. 13 Lah. 172.

SECTIONS 297, 298 and 299.

I.—GENERAL.

Notes.—1. Record of the charge. What it should contain [*P. 694, n. 1*].—The law only requires the heads of charge to be recorded. See s. 367 (5). The object of the Legislature is to have a written record of the summing up of the evidence and the laying down of the law by the Judge to the jury in order to enable the appellate Court to decide whether the Judge has properly marshalled the facts under distinct and separate heads. A. I. R. 1935 C. 31 = 80 C. L. J. 45 = 154 I. C. 110 = 1935 Cr. C. 196. If a Judge does not write his charge before delivery, which, whenever practicable is the better course, he should reduce the charge to writing as soon as possible after charging the jury so that what he said is fresh in his mind. A long delay makes it impossible for an appellate Court to know whether the written charge was really the charge which was given to the jury. 52 A 207. But the verdict of a jury will not be set aside solely on the ground that the heads of charge was defective. A. I. R. 1930 C. 712 = 32 Cr. L. J. 236 = 129 I. C. 109 = 1930 Cr. C. 1112; 9 Pat. 606. Where the law applicable to the facts is not complicated, a statement in the heads of charge to the jury that sections were read and explained to the jury, is sufficient compliance with the law. 9 Pat. 148.

2. Proper charge to the jury is indispensable [*P. 695, n. 2*].—In a trial where a man's life is in jeopardy, it is essential to take the greatest possible care to avoid mistakes. It is not sufficient for the Judge simply to point out this piece of evidence and that, this presumption and that, this bit of law and that. It is his duty to help and guide the jury to a proper conclusion, to direct their attention to essential points, to point out the weight to be attached to the evidence and to warn them gravely upon the responsibility which rests upon their shoulders in such a trial and to impress upon them that if there is any doubt in their minds they

must give the benefit of that doubt to the accused. *A. I. R. 1934 C. 169 (S. B.) = 37 C. W. N. 1061 = 1934 Cr. C. 291 = 35 Cr. L. J. 601 = 148 I. C. 172.* To charge the jury at very great length may itself be an obstacle to their arriving at a correct decision. They are laymen and to enable them to come to a correct decision, it is necessary that essentials should be clearly brought out and not overwhelmed and obscured by too great a mass of detail. *A. I. R. 1933 Pat. 496 = 1933 Cr. C. 1061 = 146 I. C. 460 = 35 Cr. L. J. 56.* The charge should shortly state the salient points in the case, the evidence adduced in it and the points for determination to the jury with reference to the law. A very long charge, though a careful one, may have the effect of confusing the jury as to the way in which the law should be applied to the case. *57 C. 1162.* The Judge must follow a system or sequence or plan in charging a jury so that the jury can easily understand what is spoken to them. *A. I. R. 1934 C. 77 = 37 C. W. N. 1102 = 35 Cr. L. J. 483 = 147 I. C. 832 = 1934 Cr. C. 33.* A charge should aim at a fair and impartial presentation of the essentials of the case to the jury for their decision rather than an attempt to lead them on speculative and conjectural grounds to a particular conclusion. *A. I. R. 1933 Pat. 481 = 144 I. C. 872 = 1933 Cr. C. 1010 = 34 Cr. L. J. 828.*

3. Judge should place before jury the case for the accused [*P. 696, n. 8*].—The fact that the pleader for the accused does not urge any particular defence, is no reason why that defence should not go to the jury in the summing up by the Judge, if there is any evidence whatever in support of the defence. *37 C. W. N. 261 = A. I. R. 1933 C. 656 = 1933 Cr. C. 1102 = 145 I. C. 821 = 34 Cr. L. J. 1078.* The Judge should not put the prosecution case too strongly and fail to put the defence case as strongly as it should have been put. *37 C. W. N. 598 (S. B.) = A. I. R. 1933 C. 426 = 143 I. C. 173 = 1933 Cr. C. 624 = 34 Cr. L. J. 533 = 20 A. I. Cr. R. 20.*

II.—JUDGE'S DUTIES WHEN DEALING WITH EVIDENCE.

4. Judge not to ask jury to presume prosecution evidence to be true unless rebutted.—Where the Judge told the jury "You should accept what these witnesses say as being true until the defence gives you some reason to reject their evidence as being tainted," it was held to be a misdirection vitiating the trial. A jury cannot be required to make the presumption against an accused person that the particular statements of a particular witness are true; still less can it be required to make such a presumption as regards the prosecution evidence as a whole. The jury should be told that it is their duty to consider whether they are convinced by the prosecution evidence and that if they are not convinced there is no law which obliges them to convict. They must be told to start with a presumption of the innocence of the accused and that the prosecution must prove their case beyond reasonable doubt. *58 C. 1095.* The less that is heard of legal presumptions in favour of veracity, the better. *59 C. 1361.*

5. Judge should deal with the evidence [*P. 697, See n. 11*].—Although it is impossible for any Judge to state every item of evidence or to draw the attention of the jury to each and every fact which has been deposed to before them, he has to give them a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side and on the other. *6 Luck. 706; A. I. R. 1935 A. 103 = 1935 Cr. C. 89; 9 Pat. 606.* Where there have been a large number of witnesses and the case was tried for several days, it is the duty of the Judge to analyse, to sift and to weigh the evidence, to marshal the facts properly and so to arrange in some sort of order before the jury the facts which are really material and upon which they should concentrate their attention. In dealing with each individual prisoner, he must take the evidence against each one, summarise it and point out to the jury how each prisoner is affected by the evidence given. He must show that some matters are particularly important, some less and some of little importance whatever. *A. I. R. 1932 C. 395 = 35 C. W. N. 404 = 1932 Cr. C. 342 = 137 I. C. 682 = 33 Cr. L. J. 436; A. I. R. 1934 C. 273 = 38 C. W. N. 77 = 35 Cr. L. J. 1313 = 151 I. C. 409 = 1934 Cr. C. 397; 57 C. 740; A. I. R. 1930 C. 136 = 50 C. L. J. 476 = 34 C. W. N. 223 = 31 Cr. L. J. 572 = 123 I. C. 751 = 1930 Cr. C. 136; 53 C. L. J. 351.* The Judge must point out the important evidence in the case as well as emphasize the points for and against the accused. draw the attention of the jury to the contradictions and discrepancies in the evidence and even express his own opinion as to what conclusion the evidence on particular points leads to, provided he makes it perfectly clear to the jury that they are the final Judges on the questions of fact. *1934 A. L. J. 1160 = A. I. R. 1934 A. 1032 = 4 A. W. R. 788 = 1934 A. L. R. 1150 = 153 I. C. 364 = 1934 Cr. C. 1339; 62 C. 337.* Where questions are put and answers recorded in a language which the witnesses do not in fact speak, the Judge should insist that the witnesses shall understand the question put, before an answer is obtained or recorded and the Judge must bring home to the jury that in such cases an accurate record is often a matter of accurate translation. He may assist the jury with his advice and criticism provided he warns them that they are not bound by the same. *14 Pat. 225.* Instead of explaining to the jury the theoretic principles of proof, it is his duty to deal with specific pieces of

evidence, and facts given in evidence, and tell the jury whether or not they are evidence which the jury must consider in that particular case. 37 C. W. N. 1131 = A. I. R. 1933 C. 722 = 34 Cr. L. J. 1231 = 146 I. C. 237 = 1933 Cr. C. 1272. It is not a misdirection for the Judge to point out that certain witnesses corroborated or supported the prosecution story. He does not thereby mean to say that those witnesses should necessarily be believed. He is merely reminding the jury of facts that are recorded in the case. 56 A. 210.

6. Judge need not give his own view of the evidence.—The Judge is entitled not to express his own view upon a disputable matter and to leave it to the jury to come to their own conclusion. 58 C. 1228 (S. B.) But on a charge of murder, if a Judge with all his advantages, forms a definite and strong opinion that the evidence is not sufficient for a conviction, it is dangerous to leave the matter to the jury without a strong indication of the Judge's own opinion, so long as he makes it clear that in spite of that opinion, they can, if they choose, disregard it and bring in a verdict of guilty. 54 C. L. J. 244 = 1931 Cr. C. 1016 = 134 I. C. 1191 = 33 Cr. L. J. 85 = A. I. R. 1931 C. 752.

7. Judge may express his opinion on evidence, but must tell the jury that they must form their own opinion [P. 698, n. 14]—The Judge has a perfect right to express his own opinion if he makes it clear to the jury that the opinion he expresses on the facts is not binding on them. A. I. R. 1933 C. 190 = 1933 Cr. C. 236 = 142 I. C. 653 = 34 Cr. L. J. 430; A. I. R. 1933 Pat. 96 = 13 P. L. T. 802 = 1933 Cr. C. 249 = 142 I. C. 809 = 34 Cr. L. J. 421; 13 Rang. 141; A. I. R. 1930 C. 430 = 31 Cr. L. J. 1115 = 126 I. C. 775 = 1930 Cr. C. 657. It is not sufficient for the Judge to give them this warning in a formal way either at the beginning or at the end of the charge. The warning must be given at the moment when he has forcibly or otherwise expressed his own opinion to the jury. A. I. R. 1934 C. 77 = 37 C. W. N. 1102 = 35 Cr. L. J. 483 = 147 I. C. 832 = 1934 Cr. C. 33. The Judge should not express himself in an assertive and dogmatic fashion and he must explain to the jury that the question is for them to decide. A. I. R. 1931 C. 178 = 34 C. W. N. 1154 = 32 Cr. L. J. 190 = 123 I. C. 811 = 1931 Cr. C. 242 = 15 A. I. Cr. R. 392 (F. B.); 52 C. L. J. 417 = 35 C. W. N. 169 = A. I. R. 1931 C. 11 = 32 Cr. L. J. 418 = 129 I. C. 677 = 1931 Cr. C. 43; A. I. R. 1934 Oudh 122 (2) = 11 O. W. N. 211 = 1934 O. L. R. 213 = 35 Cr. L. J. 502 = 1934 Cr. C. 427 = 147 I. C. 911. The Judge should not state his own view on important matters of fact in so assertive a manner as to lead the jury to believe that it is not open to them to take any other view. 1933 A. L. J. 1634 = A. I. R. 1934 A. 326 = L. R. 14 A. (Cr.) 425 = 1934 A. L. R. 402 = 35 Cr. L. J. 688 = 148 I. C. 504 = 1934 Cr. C. 410 = 20 A. I. Cr. R. 361.

8. Judge ought to point out presumptions that may be drawn from facts—failure to call independent witnesses [P. 699, n. 18]—Where independent prosecution witnesses are not called, it is not sufficient for the Judge to tell the jury that they are to give "due consideration to the absence of such witnesses." It cannot be presumed that the jury knew what they were entitled to do in the absence of such witnesses. He ought to have told the jury that if they thought there was evidence to show that those witnesses might have given relevant evidence, then they might, if they choose, presume that the evidence, if given, would have been against the case for the prosecution. 54 C. L. J. 244 = 1931 Cr. C. 1016 = 134 I. C. 1191 = 33 Cr. L. J. 85 = A. I. R. 1931 C. 752; (1935) M. W. N. 363. Where certain important witnesses for the prosecution who ought to have been called, are not called, it is the duty of the Judge to caution the jury that it was *prima facie* the duty of the prosecution and not of the accused to call them and that if they are not called without sufficient reason being shown, it was proper to draw an inference adverse to the prosecution. A. I. R. 1933 Pat. 431 = 144 I. C. 872 = 1933 Cr. C. 1010 = 34 Cr. L. J. 828; A. I. R. 1930 C. 431 = 34 C. W. N. 390 = 32 Cr. L. J. 33 = 127 I. C. 767 = 1930 Cr. C. 793; 58 C. 580. Where however, the Judge had clearly left it to the jury to say for themselves how far the failure of the prosecution to call a particular witness was so material as to raise in their minds a reasonable doubt as to the prosecution evidence, there was no misdirection. 9 Pat. 647. In the case of a person found in possession of stolen goods soon after the theft, the presumption under s. 114, Evidence Act is only that the Court may presume that he is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. This does not mean that the accused must prove affirmatively that he came by the goods innocently. If he gives any explanation which in the opinion of the jury may possibly be true, although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case. To explain to the jury that on account of the presumption the onus of proof is shifted to the accused whose duty it is to rebut it, and that if the accused fail to prove that they acquired the property lawfully the jury must convict them, was clearly wrong and the misdirection vitiated the conviction. A. I. R. 1931 C. 617 = 35 C. W. N. 291 = 1931 Cr. C. 801 = 134 I. C. 1071 = 33 Cr. L. J. 40.

9. Judge should deal with evidence against each accused separately.—Generally speaking, it is desirable and indeed obligatory that a Judge in summing up to the jury should divide up the evidence as it affects each individual accused. But where all the evidence was such that it affected all the accused persons equally or none at all, no injustice could have been done to any of the accused persons by the Judge dealing with the evidence as a whole. 61 C. 6. Where the evidence against one accused was not the same as the evidence against the other accused but was less, omission on the part of the Judge to deal with and discuss the case against the former individually and separately was a serious non-direction making the conviction untenable as against him. A. I. R. 1933 C. 5 = 37 C. W. N. 68 = 1933 Cr. C. 25 = 143 I. C. 682 = 34 Cr. L. J. 622.

III.—NON-DIRECTION.

10. Non-direction—when not a misdirection [P. 699, n. 20]—Omission to refer to matters which might have been brought in along with others bearing on the same point, cannot be relied upon as a misdirection sufficient to vitiate the trial. A. I. R. 1931 C. 533 = 1931 Cr. C. 685 = 134 I. C. 71 = 32 Cr. L. J. 1101 (S. B.) Where the defence has been substantially put to the jury, a mere omission to put this or that circumstance or suggestion, is not non-direction, which amounts to misdirection. It is not the function of the Judge to repeat to the jury every argument or suggestion urged on behalf of the defence. 60 C. 1339 ; A. I. R. 1934 C. 142 = 57 C. L. J. 583 = 35 Cr. L. J. 536 = 147 I. C. 1043 = 1934 Cr. C. 180. The Court of appeal must be satisfied on a perusal of the charge and the material evidence in the case that the omissions are so important that it may be reasonably said that they have led to an erroneous verdict. A. I. R. 1935 C. 31 = 60 C. L. J. 45 = 154 I. C. 110 = 1935 Cr. C. 196.

11. Non-direction—when a misdirection [P. 699, n. 21]—The jury should be made to understand that it is an essential principle of criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt and unless the Judge makes sure that the jury appreciate their duty in this respect, his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a jury who have not taken this fundamental principle into account, is given in a case where the essential forms of justice have been disregarded. In such a case, unless it can be predicted that properly directed the jury must have returned the same verdict, a substantial miscarriage of justice is established. A. I. R. 1933 P. C. 218. Failure to refer to matters which ought to have been placed before the jury for their consideration must be held to be a misdirection. 34 C. W. N. 954 = 1931 Cr. C. 42 = 128 I. C. 807 = 32 Cr. L. J. 186 = 15 A. I. Cr. R. 367 = A. I. R. 1931 C. 10. Where it is possible that if the attention of the jury had been drawn to a particular aspect of the evidence, it might have turned the scale in favour of the accused, omission so to draw the attention of the jury is a non-direction on a vital point amounting to misdirection. (1935) M. W. N. 48. Where it is more than possible that if the Judge had clearly called the attention of the jury to the fact that there was no corroboration of the evidence of a certain witness, they might have returned a different verdict, it is a non-direction amounting to a misdirection. 7 Luck. 390. Where the Judge thinks that the evidence is so weak that there are very great doubts as to the guilt of the accused, the omission to direct the jury to give the accused the benefit of the doubt may be a misdirection which may be said to have prejudiced the accused. A. I. R. 1935 C. 31 = 60 C. L. J. 45 = 154 I. C. 110 = 1935 Cr. C. 196.

12. Omission to direct the jury to give the accused the benefit of any doubt [P. 701, n. 23]—Where the evidence for and against the accused is more or less equally balanced, the Judge should direct the jury that if they had any reasonable doubt in their minds as to the guilt of the accused they should give the accused the benefit of it. Omission to give such a direction will be a misdirection. 52 A. 207 ; A. I. R. 1930 A. 24 = 1929 A. L. J. 1261 = 31 Cr. L. J. 33 = 120 I. C. 264 = 1930 Cr. C. 40.

IV.—ADMISSION, RELEVANCY, Etc., OF EVIDENCE.

13. Judge must decide upon the admissibility of evidence [P. 702, n. 29]—Where an accused retracted his confession on the ground that it was induced by threat and persuasion, it is for a Judge to decide whether the confession is admissible and not leave it to the jury to decide. Even if he decides that it is admissible, he must point out to the jury that the fact that he considered the evidence to be admissible does not necessarily mean that it was true and it was for the jury to decide whether they should accept the confession. A. I. R. 1933 C. 187 = 34 Cr. L. J. 389 = 142 I. C. 639 = 1933 Cr. C. 233 ; A. I. R. 1934 C. 651 = 38 C. W. N. 586 = 36 Cr. L. J. 70 = 152 I. C. 234 = 1934 Cr. C. 933 ; 61 C. 399 ; A. I. R. 1934 C. 717 = 36 Cr. L. J. 138 = 132 I. C. 681 = 1934 Cr. C. 1102 ; (1935) M. W. N. 321. It is for the Judge to decide whether the confession was voluntary or not and for this purpose the proper course is for the Judge to examine the accused

in the absence of the jury and to ascertain from him without cross-examining him, what actually took place. **A. I. R. 1933 C. 838 (S. B.) = 145 I. C. 863 = 34 Cr. L. J. 1087 = 1933 Cr. C. 1495.** Whether a confession was voluntary and whether it was true are both questions of fact. But in order to decide whether the confession is admissible in law, it is necessary to decide *prima facie* whether the confession was voluntary. A voluntary confession is not necessarily true and *vice versa*. But coming to the proof of truth of the confession, the jury is entitled to consider the question of voluntariness in its bearing on the truth of the confession. Where the Judge directed the jury that he has decided that the confession was voluntary and that the jury should take that point as settled, there was serious misdirection inasmuch as he withdrew from the jury an issue of fact relating to the truth of the confession. **62 C. 312 ; A. I. R. 1935 C. 308.**

14. Evidence of hostile witness.—The fact that a witness is dealt with under s. 154, Evidence Act in no way warrants a direction to the jury, that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point they may not give credit to him on another. The rule of law is that it is for the jury to say. **58 C. 1404 (F. B.) ; A. I. R. 1932 C. 523 = 36 C. W. N. 356 = 1932 Cr. C. 498 = 138 I. C. 373 = 33 Cr. L. J. 604.** But where the Judge left the evidence to the jury with the caution that they should be careful in accepting the evidence of such a witness in support of the prosecution case and told them that it was for them to say if it was at all safe to accept that evidence, nothing can be said against this direction to the jury. **59 C. 136.**

V.—ADMISSION OF INADMISSIBLE EVIDENCE.

15. When jury placed in possession of inadmissible evidence, there is misdirection [P. 702, n. 32].—Where the alleged statements of a witness before the police were not properly put in evidence under s. 162, and not even proved as substantive evidence, but the Judge at the end of the cross-examination of the witness put certain questions to him with reference to the statements made by him before the police, and made use of them in his charge to the jury in order to discredit the witness so far as he did not support the prosecution case, it was held that there was a misdirection. **58 C. 1009.** Any reference to the statements to the police is in direct contravention of the provisions of s. 162 and is not permissible under the law. **38 C. W. N. 536 = A. I. R. 1934 C. 651 = 36 Cr. L. J. 70 = 152 I. C. 234 = 1934 Cr. C. 933.** Where the Judge directed the jury that though the statements made to the police were inadmissible, the fact remained that the defence did not place before them any contradictory statement as regards the account of the occurrence, it was held that there was a misdirection, as the impression conveyed to the jury was that the evidence of the witnesses before the Court, found corroboration in the statement made by them to the police. **A. I. R. 1934 C. 717 = 36 Cr. L. J. 135 = 152 I. C. 631 = 1934 Cr. C. 1102.**

16. Duty of Judge when inadmissible evidence has come to the knowledge of the jury [P. 703, n. 34]—The Court ought not to allow inadmissible questions to be put, for it may possibly cause some prejudice in the minds of the jury in spite of the warning subsequently given by the Judge when summing up. **A. I. R. 1933 Pat. 488 = 1933 Cr. C. 1030 = 144 I. C. 936 = 14 P. L. T. 580 = 34 Cr. L. J. 892.** Where the Sessions Judge brought to the notice of the jury certain statements alleged to have been made by the prosecution witnesses to the police when they were investigating the occurrence, but the Judge had cautioned the jury not to take the statements as substantive evidence, but that inasmuch as they had been introduced into the record, they were free to look at them for the purpose of testing the evidence of the prosecution witnesses, it was held that the accused were not prejudiced thereby, justifying interference with the verdict of the jury. **35 C. W. N. 164 = 1931 Cr. C. 806 = 32 Cr. L. J. 1245 = 134 I. C. 763 = A. I. R. 1931 C. 622.**

VI.—JUDGE'S DUTY TO DEAL WITH THE LAW.

17. It is imperatively necessary for the Judge to expound the law to the jury [P. 704, n. 35].—Omission by a Judge in his charge to the jury to lay down the law by which the jury were to be guided is more than a misdirection and s. 537 could not be applied to such a case. Where the Judge failed to define what is meant by "robbery" it was a clear violation of the imperative provisions of the Code. **A. I. R. 1935 Oudh 175 = 11 O. W. N. 200 = 1934 O. L. R. 202 = 35 Cr. L. J. 507 = 147 I. C. 976 = 1935 Cr. C. 298.** In omitting to explain to the jury the essential ingredients of the offence, the Judge fails in his duty by withholding from the jury the legal assistance which the case demands. **A. I. R. 1930 A. 24 = 1929 A. L. J. 1261 = 31 Cr. L. J. 83 = 120 I. C. 284 = 1930 Cr. C. 40.** There is no bar to the Judge in explaining in the charge to the jury what particular view was taken by the highest Court of the land, but he must tell the jury how to apply the

law laid down by the decisions of the High Court, to the facts of the particular case. **57 C. 1162.** Though the Judge need not explain to the jury abstract principles of law, he must explain those particular sections of the Penal Code which apply to the particular case which the jury are trying, and he ought to set out in the copy of the charge which is sent up with the record, his explanation in sufficient detail to enable the High Court to ascertain whether he has properly explained the law. **37 C. W. N. 1131 = A. I. R. 1933 C. 722 = 34 Cr. L. J. 1231 = 146 I. C. 237 = 1933 Cr. C. 1272; A. I. R. 1934 C. 77 = 37 C. W. N. 1102 = 35 Cr. L. J. 483 = 147 I. C. 832 = 1934 Cr. C. 33.**

18. Cases based on circumstantial evidence—Judge's duty to explain the principles to be followed.—It is difficult for laymen to decide at what point suspicion merges into certainty of the kind on which a conviction can be based and in the absence of any clear directions as to the principles to be followed, the jury are very liable in cases based on circumstantial evidence to return a verdict of "guilty" on mere suspicion. Failure to explain the principles to be followed in dealing with circumstantial evidence, amounts to misdirection, and if in consequence, the jury is not in a position properly to appreciate the evidence and base a correct decision thereon, there is failure of justice and the trial is vitiated. **A. I. R. 1931 C. 11 = 52 C. L. J. 417 = 1931 Cr. C. 43 = 35 C. W. N. 169 = 129 I. C. 677 = 32 Cr. L. J. 418.**

VII.—ACCOMPLICE TESTIMONY AND CONFESSIONS.

19. Jury should be warned that they need corroboration of the testimony of an accomplice [*P. 705, See n. 40*].—In dealing with the evidence of an accomplice, it is the duty of the Judge to explain to the jury the provisions of ss. 133 and 114, Evidence Act, with the relevant parts of s. 4. It is not his duty to tell them as a matter of law that they must not convict unless they find that the evidence of the accomplice is corroborated in material particulars. He may, if he thinks proper in any particular case, express to the jury his own opinion, that in the circumstances of the particular case, they will do well to require corroboration in material particulars. But he should clearly make them understand that this is his opinion on a question of fact which they need not accept. If he does express such an opinion it is proper further to explain, what would in his judgment be material particulars. **13 Pat. 529.** Before the evidence of an accomplice as to his participation in the offence can be accepted, the jury should be warned that they need corroboration of that fact as much as of anything else. If there is no corroboration of that fact the Judge should direct the jury accordingly and his omission to do so amounts to misdirection. **A. I. R. 1932 C. 295 = 1932 Cr. C. 264 = 17 A. I. Cr. R. 424 = 137 I. C. 497 = 33 Cr. L. J. 477; 56 C. 150.** The Judge should also tell the jury that the corroboration must come from independent witnesses and that it would not do if that corroboration would come from the evidence of an accomplice which in itself was tainted. Omission to give such a direction is a serious misdirection. **A. I. R. 1933 C. 6 = 36 C. W. N. 874 = 140 I. C. 379 = 1933 Cr. C. 26 = 34 Cr. L. J. 23 = 19 A. I. Cr. R. 145.** It must be pointed out that such independent corroboration must implicate the particular accused. **A. I. R. 1933 C. 509 = 37 C. W. N. 290 = 1933 Cr. C. 814 = 144 I. C. 879 = 34 Cr. L. J. 841; A. I. R. 1930 C. 481 = 34 C. W. N. 390 = 32 Cr. L. J. 33 = 127 I. C. 767 = 1930 Cr. C. 793.** A receiver of stolen property knowing it to have been stolen is an "accomplice" under the I. P. C. and the Judge is bound to tell the jury that he was a tainted witness whose evidence must be received with great caution. Failure to do so is a material misdirection. **58 M. 86.** The High Court has no right to interfere with the verdict, if the jury on a proper direction thinks fit to act on the evidence of the approver, as the jury is committing no illegality thereby. **A. I. R. 1933 C. 509 = 37 C. W. N. 290 = 1933 Cr. C. 814 = 144 I. C. 879 = 34 Cr. L. J. 841; 13 Pat. 529.** On the one hand a conviction founded on the uncorroborated evidence of one or more accomplices alone is valid in law, but the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. The Judge is bound to caution the jury and to advise them that generally speaking, the natural presumption for them to make was that the evidence of the approvers was unreliable though they were not compelled in law to act on the presumption. **A. I. R. 1933 Pat. 500.** It would amount to misdirection either to omit to give the jury a suitable warning or to tell the jury that an approver's evidence against a particular accused has received independent corroboration when this is not in fact the case. **A. I. R. 1933 Pat. 96 = 13 P. L. T. 802 = 1933 Cr. C. 249 = 142 I. C. 809 = 34 Cr. L. J. 421; 56 C. 150.**

20. Direction in case of retracted confession [*P. 708, n. 46*].—It is a misdirection to tell the jury that the accused might be convicted upon his own statements which had subsequently been retracted, without further corroboration. **38 C. W. N. 586 = A. I. R. 1934 C. 651 = 36 Cr. L. J. 70 = 152 I. C. 234 = 1934 Cr. C. 933.** Where the Judge drew the attention of the jury to the fact that in the retracted confession the confessing accused had named the co-accused, it was a serious misdirection, for a retracted confession has no value at all against a co-accused. **39 C. W. N. 27 = 1934 Cr. C. 1368 = A. I. R. 1934 C. 883.**

VIII.—JOINT TRIAL OF SEVERAL ACCUSED.

21. **Jury should be warned not to act upon confession of co-accused without corroboration** [*P.* 709, *n.* 50]—Where the Judge failed to give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-accused, it is not possible to say that the omission did not seriously prejudice the other accused and the verdict should therefore be set aside. **57 C. 801.**

IX.—CHARGES IN PARTICULAR OFFENCES.

22. **Culpable homicide not amounting to murder** [*P.* 711, *n.* 57]—Where the Judge in explaining s. 304, I. P. C. said "if you hold that the accused intended to cause such bodily injury that death would be a possible but not the most probable result, you will find him guilty under s. 304, Part I," *held.* the direction would have been correct if the Judge had not used the word "possible" but had adhered to the words of the section and used the word "likely." As it was, it could not be said that the misdirection may not have misled the jury. **A. I. R. 1930 C. 136 = 50 C. L. J. 476 = 34 C. W. N. 223 = 31 Cr. L. J. 572 = 123 I. C. 751 = 1930 Cr. C. 136.**

23. **Kidnapping**.—Where the girl was already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping, it cannot be said with any reason or sense that she was kidnapped "in order that she might be seduced to illicit intercourse." Where therefore the Judge told the jury that the fact of previous intimacy with the girl was wholly immaterial, it was a misdirection. **60 C. 1457.**

24. **Rape** [*P.* 712, *n.* 60]—In cases of rape it has been the practice for many years for the Judge to warn the jury not to accept the evidence of the girl unless they find that it is corroborated in some material particulars implicating the accused. But he ought to tell them that if, in spite of his warning, they come to the conclusion that they believe the girl and think the accused guilty, then they have the right to convict him on her uncorroborated evidence. **A. I. R. 1933 C. 833 = 1933 Cr. C. 1493 = 38 C. W. N. 52 = 147 I. C. 999.** The kind of corroboration required must be independent evidence, that is to say, the evidence of some witnesses other than the girl herself. **A. I. R. 1934 C. 7 = 38 C. W. N. 108 = 1934 Cr. C. 23.** The earliest version as stated by the prosecutrix should be prominently placed before the jury, and their attention should be drawn to the discrepancies, if any, between the first information report and the evidence as given by the prosecutrix in Court. **A. I. R. 1934 Nag. 94 = 30 N. L. R. 262 = 35 Cr. L. J. 957 = 149 I. C. 447 = 1934 Cr. C. 377 = 21 A. I. Cr. R. 247.** Where the accused denied the whole story, it is a misdirection for the Judge to tell the jury that because the plea of consent has not been taken by the accused, they need not determine whether the girl was below 14 or above 14 and that they need not determine whether she consented or not. He ought to have told the jury that the burden was on the prosecution to prove in addition to the factum of sexual intercourse, that the girl was below 14 or else that the accused committed that act against her will or without her consent. **37 C. W. N. 484 = A. I. R. 1933 C. 606 (1) = 1933 Cr. C. 970 = 145 I. C. 923 = 34 Cr. L. J. 1161.**

25. **Robbery** [*P.* 710, *n.* 54]—In charging the jury with regard to the offence of robbery, the Judge must tell the jury that it is essential not only that violence or hurt or wrongful restraint was caused during the committing of the theft, but also that it must be caused for the purpose of enabling theft to be carried out. **60 M. L. J. 691 = (1930) M. W. N. 1142 = 34 M. L. W. 349 = A. I. R. 1931 M. 481 = 4 M. Cr. C. 26 = 32 Cr. L. J. 973 = 133 I. C. 7 = 1931 Cr. C. 545; (1934) M. W. N. 244; 54 M. 588.**

26. **Dacoity** [*P.* 711, *n.* 56]—Where the accused was charged with an offence under s. 395, I. P. C. it is not open to the Judge to suggest to the jury some other offence, *e.g.*, those under ss. 323 and 448, I. P. C. simply because there was a doubt as to the question of fact. S. 237 does not apply to cases where the facts themselves are doubtful and there was clearly a misdirection. **59 C. 8.** If the Judge has adequately explained in his charge to the jury what is necessary to constitute the offence of dacoity, he has done all that can reasonably be expected of him. **A. I. R. 1932 C. 295 = 1932 Cr. C. 264 = 17 A. I. Cr. R. 424 = 137 I. C. 497 = 33 Cr. L. J. 477.** Where six persons were charged with the offence of dacoity and the trial resulted in the acquittal of three of the accused and conviction of the other three only, it should have been explained to the jury that in order to return a verdict of guilty of dacoity against the three convicted persons they must be satisfied in their minds that there were at least two other persons present when the offence was committed. **A. I. R. 1931 M. 481 = 34 M. L. W. 349 = (1930) M. W. N. 1142 = 4 M. Cr. C. 26 = 60 M. L. J. 691 = 32 Cr. L. J. 973 = 133 I. C. 7 = 1931 Cr. C. 545; 54 M. 588.**

27. **Dacoity with murder and murder** (Ss. 396 and 302, I. P. C.)—Where the accused were charged under s. 396, I. P. C. and the Judge directed the jury that if they found the number of persons to be less than five they could split up the charge under s. 396, I. P. C. and treat it as a charge under s. 302, I. P. C. together with a

charge under s. 392, I. P. C., *i.e.*, as a substantive charge of murder *plus* a substantive charge of robbery, it was held that it was a misdirection, as the charge under s. 302 is not a minor charge to the charge under s. 396 as the charge under s. 396 is a charge under which a person who has not committed murder is liable to be held to commit murder because he is a member of a gang of dacoits in the course of which dacoity somebody else committed murder. 36 C. W. N. 880 (S. B.) = A. I. R. 1933 C. 294 = 34 Cr. L. J. 524 = 143 I. C. 14 = 1933 Cr. C. 391 = 20 A. I. Cr. R. 10.

28. Criminal breach of trust [P. 710, n. 53]—A person who intermeddles with the estate of a deceased or does any other act which belongs to the office of executor, where there is no rightful executor or administrator in existence, is made accountable by the civil law to the extent of all assets which may have come into his hands. This however is not based upon entrustment but upon the basis that not being entrusted, he had no business to intermeddle. The application of the doctrine in no way depends upon the absence of bad faith in the person intermeddling. Where therefore the Judge told the jury that a person was guilty of criminal breach of trust upon the basis that he, as an intermeddler became an executor *de son tort*, it amounted to misdirection. 58 C. 1051 (F. B.)

SECTION 300.

Note.—All the jurors should jointly consider the verdict.—If the jurymen are not able to come to a decision or agree upon a verdict before retiring, then the law requires that they should retire to consider their verdict and it follows that they should all be in their retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the presiding Judge. Where therefore five of the jurors came out of the retiring room and sat in Court and the remaining four came out half-an-hour later and then sat in Court, the verdict was set aside. A. I. R. 1930 C. 446 = 31 Cr. L. J. 1090 = 126 I. C. 753 = 1930 Cr. C. 707.

SECTION 301.

Notes.—1. **Verdict given after the jury had been discharged is incompetent.**—Where the Judge discharged the jury as they were not agreed but subsequently conferred with the foreman and then gave the jury further instructions after which they returned a verdict of guilty, the Privy Council held that the verdict was incompetent and the conviction unsustainable. (1934) M. W. N. 1020 (P. C.) = 40 M. L. W. 419 = 1934 A. L. J. 1000 = 4 A. W. R. 1152 = 36 P. L. R. 247 = 1934 Cr. C. 1134 = 151 I. C. 529 = A. I. R. 1934 P. C. 227 (1).

2. Form of verdict [P. 718, n. 3]—The statute law in this country has not laid down any particular form in which the jury are to deliver their verdict. Consequently there is no legal bar in the way of their returning the verdict in any way they think fit provided it is complete and exhaustive as to facts in issue which go to make up the charges. A. I. R. 1935 C. 31 = 60 C. L. J. 45 = 151 I. C. 110 = 1935 Cr. C. 196. That the jury "give the accused person the benefit of the doubt" is not a verdict which is known to the law though jurors sometimes do express a verdict of not guilty in that way. A verdict of not guilty covers every degree of mental condition from mere hesitating doubt as to the guilt of the accused to a complete conviction of his innocence. A. I. R. 1933 C. 404 = 37 C. W. N. 341 = 1933 Cr. C. 582 = 143 I. C. 600 = 34 Cr. L. J. 608. In a charge under s. 408, I. P. C. in respect of a gross sum misappropriated on several dates within one year, the Judge asked the jury what their verdict was in respect of the charge under s. 408, I. P. C. on the several items set forth in the charge, and the foreman replied that the accused was guilty in respect of some of the items and not guilty in respect of others. It was held that the Judge should have asked the jury what their verdict was in respect of the charge under s. 408 without requiring them to specify the items. The defect was however, merely one of form and not of substance and the verdict was not illegal. A. I. R. 1930 C. 717 = 34 C. W. N. 901 = 32 Cr. L. J. 321 = 129 I. C. 359 = 1930 Cr. C. 1117.

3. No intermediate verdict.—Where the prosecution case was that the offence was committed before dark so that the eye-witnesses were able to identify the accused and the Judge without summing up the entire case directed them to return an intermediate verdict of whether or not the offence was committed before dark and on their finding that it was committed after dark, acquitted the accused, held that the law does not recognise intermediate verdicts and the procedure adopted was illegal. 33 C. W. N. 451 = A. I. R. 1929 C. 62 = 30 Cr. L. J. 434 = 115 I. C. 257 = 12 A. I. Cr. R. 249.

SECTION 303.

Note.—When verdict is unambiguous, questions cannot be asked of the jury [*P. 721, n. 1*].—When there was nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves nor was there anything to show that the verdict was delivered by accident or mistake, there is nothing in the Code which empowers the Judge to question the jury. *A. I. R. 1931 M. 775 = (1931) M. W. N. 857 = 34 M. L. W. 380 = 61 M. L. J. 915 = 4 M. Cr. C. 342 = 1931 Cr. C. 1031 = 134 I. C. 986 = 32 Cr. L. J. 1276; A. I. R. 1931 C. 636 = 35 C. W. N. 407 = 1931 Cr. C. 836 = 134 I. C. 1133 = 33 Cr. L. J. 29; A. I. R. 1930 C. 443 = 34 C. W. N. 283 = 31 Cr. L. J. 1150 = 127 I. C. 79 = 1930 Cr. C. 751 = 15 A. I. Cr. R. 61.* Where the jury returned a verdict of guilty under s. 304, I. P. C. and the Judge proceeded to question them as to what the intention of the accused was and on their being unable to say what the intention was, recharged them after which the jury returned a fresh verdict of guilty under s. 302, I. P. C., *held*, the verdict under s. 302, was not obtained according to law. It was of course open to the Judge to ascertain and find out whether the verdict of guilty was under the first or the second part of s. 304, I. P. C. But if the Judge thinks that the verdict under s. 304, I. P. C. is not correct but that it should be under s. 302, I. P. C. and questions the jury to find out whether the question of intention has been duly considered, such questioning would not be warranted by this section. *61 C. 256 (S. B.)* Where the verdict is not clear and definite there is however nothing wrong in sending the case back to the jurors for a clear verdict according to law. *A. I. R. 1934 Oudh 34 = 10 O. W. N. 1270 = 1934 O. L. R. 149 = 1934 Cr. C. 88 = 147 I. C. 689.*

SECTION 304.

Notes.—1. Jury may amend verdict if delivered by mistake [*P. 724, n. 1*].—It appeared that the jury were confused as to the names of the accused and only named seven of them, and when the Court asked them again whether they found all the accused guilty under a particular section, it led to some misconception on the part of the jury which induced them to mention the number "five." After a fresh direction about the various sections had been given by the Court they retired to reconsider their verdict and came back and gave a second verdict. It was held that in the circumstances the verdict must be upheld. *58 C. 1335.*

2. Section does not apply where jury deliver wrong verdict owing to a misunderstanding of the law [*P. 724, n. 2*].—The section contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury and it has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury. In such cases the Judge is not entitled to address another charge to the jury on the law and to request them to reconsider their verdict. *A. I. R. 1931 M. 775 = (1931) M. W. N. 857 = 34 M. L. W. 380 = 4 M. Cr. C. 342 = 1931 Cr. C. 1031 = 61 M. L. J. 915 = 134 I. C. 986 = 32 Cr. L. J. 1276.* But *see* *60 C. 729*, where it was held that it was proper for the Judge to recharge the jury in a case where their verdict under one section was in point of fact obviously inconsistent with the decision which the jury had already expressed in connection with the other charge against the accused. The Judge is not obliged to accept an absurd verdict either as a verdict of guilty or of not guilty and he is entitled to tell the jury to consider the matter over again after recharging them instead of endeavouring to cross-examine the jury, which, as a matter of fact, means cross-examination of the foreman. *57 C. 61.*

3. The power of amendment must be exercised before or immediately after verdict is recorded [*P. 724, n. 3*].—Generally speaking, after the verdict has been recorded by the Judge and the jury have left the box, it would be improper on the part of the Judge to listen to any application to amend the verdict. *58 C. 1138.*

SECTION 306.

Note.—"When the Judge does not think it necessary to express disagreement."—This section does not require that the Judge should agree with the verdict of the jury before accepting it, but only that he should not think it necessary to express disagreement. It may not infrequently happen that a Judge trying a case with jury considers that the appreciation of evidence by the jury is incorrect and that the verdict is wrong, but it is not so perverse a verdict as to justify a reference to the High Court. *A. I. R. 1935 B. 165 = 37 Bom. L. R. 109.*

SECTION 307.

POWERS OF SESSIONS JUDGE.

Notes.—1. When reference may be made [*P. 727, n. 2*].—Section 307 places a powerful weapon in the hands of the Judge in the moffusil which is not available to a Judge of the High Court sitting in Session, to prevent miscarriage of justice on account of a wrong verdict on the part of the jury and it is necessary that the trial Judge should himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict. *62 C. 337*. But the mere fact that in the view of the Judge, on the evidence in the case the accused should have been given the benefit of doubt and that in his view the jury's appreciation of evidence seemed not to be proper, is hardly a ground for reference under this section. *57 C. 1183*; *A. I. R. 1929 C. 737 = 1929 Cr. C. 399*, *A. I. R. 1930 Pat. 208 = 11 P. L. T. 605 = 31 Cr. L. J. 54 = 120 I. C. 290 = 13 A. I. Cr. R. 182*. Where the verdict is one which would not be come to by a reasonable man, then a reference is competent. *A. I. R. 1930 Pat. 174 = 11 P. L. T. 452 = 30 Cr. L. J. 1114 = 119 I. C. 898*. A duty is cast on the Judge of considering the verdict. He must make up his mind whether he agrees or disagrees with the verdict and in the latter case form an opinion on the necessity for the ends of justice of submitting the case to the High Court. *13 Lah. 573*. The Sessions Judge should not refer a case unless his dissent from the opinion of the jury is such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court. *11 Pat. 669*. The words "necessary for the ends of justice" to submit the case mean something more than that the Judge should be in complete disagreement with the verdict. The necessity of submitting a case should depend upon the gravity of the offence and its prevalence and considerations of a similar nature. *A. I. R. 1933 C. 404 = 37 C. W. N. 341 = 1933 Cr. C. 582 = 143 I. C. 600 = 34 Cr. L. J. 608*. A disagreement within the meaning of this section is one of the conditions precedent to a reference. It is very doubtful whether a Judge is justified in referring the case to the High Court, where his quarrel with the jury's verdict is not that the persons who were found guilty should in fact have been found not guilty, but that logically the persons who have been found not guilty should have been found guilty as well. *A. I. R. 1933 C. 472 = 37 C. W. N. 591 = 34 Cr. L. J. 965 = 145 I. C. 365 = 1933 Cr. C. 752 = 20 A. I. Cr. R. 386*. Where it was apparent that the jury were influenced by their private knowledge based on what they had heard outside the Court and there were indications that they were biassed, a verdict under such circumstances cannot be sustained. *59 C. L. J. 15 = A. I. R. 1934 C. 432 = 35 Cr. L. J. 1311 = 151 I. C. 365 = 1934 Cr. C. 669*.

2. Points to be noted when making reference [*P. 728, n. 5*].—*What the letter of reference should state* [*N. 5 (iii)*].—A letter of reference ordinarily should state the case and the verdict of the jury and concisely the ground upon which the Judge differs from the verdict and considers it necessary in the ends of justice to submit the case to the High Court. *57 C. 1183*; *A. I. R. 1929 Pat. 16 = 9 P. L. T. 649 = 30 Cr. L. J. 210 = 113 I. C. 694*.

Judge should state what offence the accused has committed [*N. 5 (iv)*].—The section requires the Judge to state the offence which he considers had been committed. The mere omission however, to state the offence is no ground for rejecting the reference. *A. I. R. 1933 C. 404 = 37 C. W. N. 341 = 1933 Cr. C. 582 = 143 I. C. 600 = 34 Cr. L. J. 608*.

3. Sessions Judge to make reference in respect of all charges.—Where the accused is tried on several charges and the Sessions Judge agrees with the verdict on some of the charges and disagrees in respect of others he should refer the whole case to the High Court. The High Court cannot approach the transaction as a whole with its hands tied as to one or more aspects. *11 Pat. 395*; *A. I. R. 1933 C. 665 (S. B.) = 37 C. W. N. 1180 = 34 Cr. L. J. 918 = 145 I. C. 236 = 1933 Cr. C. 1104; 52 A. 881*.

4. Joint trial of offences some triable by jury and some with the aid of assessors [*P. 729, n. 6*].—When the accused is charged with different offences some triable by jury and some with the aid of assessors, the Sessions Judge should dispose of the charges which were triable with the aid of assessors and then it will be open to him to consider whether the interests of justice require him to make a reference on the other charge. He has no jurisdiction to refer the whole case. *55 M. 715*; *A. I. R. 1934 Pat. 424 = 15 P. L. T. 367 = 144 I. C. 16 = 1934 Cr. C. 928*. The charges mentioned in sub-section (2) refer only to charges triable by jury. *A. I. R. 1932 B. 61 = 33 Bom. L. R. 1871 = 33 Cr. L. J. 172 = 135 I. C. 495 = 1932 Cr. C. 85*.

PROCEDURE AND POWERS OF HIGH COURT.

5. **When Judge has accepted verdict on certain charges, whether High Court can vary** [P. 730, n. 12]—In a reference under this section the whole case is open for consideration and the High Court should give due weight to the opinions of the Judge and the jury on all the charges and then convict or acquit the accused. The High Court may exercise any of the powers which it may exercise on appeal. In 41 C. 662 although there is a statement that the Judge has no power to interfere with the unanimous verdict of the jury with which the Judge agrees, it depends on the facts of the case and the dictum must not be taken to apply in general. 60 C. 427.

6. **High Court's powers of interference with the verdict of a jury** [P. 731, n. 14]—The High Court should be reluctant to interfere with the unanimous verdict of the jury unless it is manifestly wrong and unless it is necessary to do so in the interests of justice. Of course, any crystallised rule of law cannot be laid down to guide the Courts in every case that comes before it, but it is now accepted that the High Court will not interfere with the unanimous verdict of the jury unless it is of opinion that it is unreasonable on the particular facts of the case. 57 C. 1183; 50 C. L. J. 518 = A. I. R. 1930 C. 141 = 31 Cr. L. J. 667 = 124 I. C. 486 = 1930 Cr. C. 141; 3 Luck. 456; 5 Luck. 720. S. 307 was passed to provide a safeguard in jury trials because the Legislature was not satisfied that a jury could always be relied upon to do their duty. Otherwise, the verdicts of juries were intended to prevail and it was not contemplated that the High Court would upset the verdicts of juries unless it came to the conclusion that they were perverse, that is to say, that the jury deliberately refused to do their duty as jurors or that they had failed to comprehend the evidence. A. I. R. 1931 C. 601 = 1931 Cr. C. 753 = 35 C. W. N. 1212 = 54 C. L. J. 499 = 134 I. C. 1053 = 33 Cr. L. J. 11; 56 C. 132; A. I. R. 1934 Oudh 399 = 11 O. W. N. 905 = 1934 O. L. R. 647 = 35 Cr. L. J. 1130 = 150 I. C. 845 = 1934 Cr. C. 1324; A. I. R. 1929 A. 338 = 1929 A. L. J. 509 = L. R. 10 A. (Cr.) 80 = 30 Cr. L. J. 1078 = 119 I. C. 443 = 11 A. I. Cr. R. 547; A. I. R. 1929 Nag. 113 = 30 Cr. L. J. 789 = 117 I. C. 277. Where the Judge takes one view and the jury takes another, it is the primary duty of the High Court before it interferes to satisfy itself that the jury on a fair consideration of the evidence in the case has taken a perverse view and that the jury's verdict ought not to be allowed to stand. This is by no means a hard and fast rule. The Judge's views should be given the same weight as the verdict of the jury. If, after sifting the evidence, the High Court reaches the conclusion that the Jury's verdict can be allowed to stand, there is an end of the matter. A. I. R. 1932 C. 656 (F. B.) = 138 I. C. 278 = 56 C. L. J. 19 = 1932 Cr. C. 648 = 33 Cr. L. J. 593; 13 Lah. 873; 1931 A. L. J. 695; 8 Luck. 439. A full Bench of the Madras High Court held in 51 M. 956 that the jury is primarily the tribunal to find the facts and that it is not for the High Court to interfere with the verdict unless it is unreasonable. In 56 M. L. J. 103 *Wallace, J.* referring to the Full Bench decision in 51 M. 956 suggested that the view of the Full Bench may require some reconsideration in view of the fact that on a reference under s. 307 it is the High Court which records the conviction and passes the sentence and the accused has therefore no right of appeal as from a Sessions Judge to the High Court. The reference in fact takes away the right of appeal which he would otherwise have to the High Court. The Full Bench precludes the Court from considering whether there were in fact misdirections vitiating the verdict although if there had been no reference, the accused would have been able to come up on appeal and plead such misdirections. *Walsh, J.* observed that it was inequitable that if the Sessions Judge's efforts in favour of the accused fails, the accused should be in a worse position than if no reference had been made at all. 56 M. L. J. 103 = 29 M. L. W. 396 = (1929) M. W. N. 194 = A. I. R. 1929 M. 135 = 2 M. Cr. C. 31 = 30 Cr. L. J. 843 = 117 I. C. 787. In a later case the Full Bench decision was interpreted to mean this: On the assumption that the Sessions Judges will not make references unless they think that the verdicts are manifestly wrong, the duty of the High Court is confined to considering whether the opinion of the Judge is supported by evidence. (1931) M. W. N. 1053 = 38 M. L. W. 44 = A. I. R. 1932 M. 21 = 4 M. Cr. C. 389 = 1932 Cr. C. 1 = 136 I. C. 33 = 33 Cr. L. J. 215. In 11 Pat. 669 it was held that the view that the verdict of the jury cannot be attacked unless it can be shown to have been perverse or manifestly wrong, is erroneous. The duty of the High Court on a reference under this section is to consider the whole of the evidence and the opinions of the Sessions Judge on the one hand and of the jury on the other and thereupon, as directed by the statute, to exercise all the powers of the Court of Appeal, remembering that the duty of an Appellate Court where an appeal is given on questions of fact is to throw upon those who seek to disturb the verdict of the jury or other first tribunal of fact, the *onus* of showing that the verdict is wrong.

No distinction between verdict of acquittal and verdict of conviction. The section makes no distinction between cases of acquittal and conviction. Just as in cases of acquittal the High Court has to see that there was evidence on which the jury could properly acquit, so in the case of conviction it has to see that there was

evidence on which the jury could properly convict; in each case the verdict must have been perverse before the High Court could interfere. Though this statement is correct as a proposition of law, in dealing with the weight and volume of evidence, the two cases differ because of the presumption of innocence. **A. I. R. 1933 B. 144 = 35 Bom. L. R. 183 = 1933 Cr. C. 331 = 143 I. C. 495 = 34 Cr. L. J. 660; 34 Bom. L. R. 896.**

7. Power of High Court to convict the accused of offences not charged [*P. 732, n. 17*].—Where in a trial by jury under s. 19 (f) of the Arms Act, the Judge disagreeing with the verdict of acquittal referred the case to the High Court, the High Court has power under s. 307 (3) read with ss. 236 and 237 (1), if it found that the accused was also guilty under s. 20 of the Arms Act to convict him thereunder even though no charge under s. 20 had been framed against the accused at the trial. **55 A. 681.**

8. Power to order retrial.—Under sub-section (3) the High Court has ample power in a case in which there has been no proper or adequate trial, to make an order that the accused persons should be retried. **A. I. R. 1935 C. 184 (F. B.) = 39 C. W. N. 368 = 1935 Cr. C. 241.**

SECTION 308.

Note.—Indiscretion on the part of a juror is no ground for retrial.—It may be an indiscretion on the part of a juror to make observations about a case even in the bosom of his family. But the mere circumstance of his having mentioned to a friend in a conversation that he does not think the prosecution case to be true is not a matter which at the end of the trial can be used as a reason for beginning the trial afresh. **A. I. R. 1932 C. 750 (2) = 1932 Cr. C. 744 = 33 Cr. L. J. 869 = 140 I. C. 18.**

SECTION 309.

Notes.—1. Whether Judge should refer to the opinion of the assessors in judgment.—It is the usual practice for the Judge to refer to the opinion of the assessors. Omission to do so does not, however, vitiate the trial but is merely an omission in the judgment which can be cured under s. 537, unless it has in fact occasioned a failure of justice. Where the conclusions of the Judge are in accordance with the opinion of the majority of the assessors, his failure to refer to their opinion cannot be said to have caused any failure of justice. **A. I. R. 1933 Lah. 910 = 1933 Cr. C. 1297 = 146 I. C. 677 = 35 Cr. L. J. 188.**

2. Recording of opinion of assessors imperative [*P. 734, n. 5*].—The Sessions Judge is bound to record the opinion of each assessor in respect of all the charges on which the accused were being tried and his failure to do so merely means that he has virtually tried the case without the aid of assessors and the trial is void *in toto*. **A. I. R. 1934 Omdh 354 = 11 O. W. N. 831 = 1934 O. L. R. 586 = 35 Cr. L. J. 1066 = 1934 Cr. C. 1049 = 150 I. C. 509; see 13 Pat. 729.** Each of the assessors should be asked to give his opinion clearly as to what happened and he should then, if necessary, give a further opinion on such matters as intention, knowledge, etc. **A. I. R. 1929 Lah. 37 = 30 Cr. L. J. 378 = 115 I. C. 66.**

3. Questioning of Assessors as to reasons for their opinion [See *P. 735, n. 10*].—The law as regards juries is embodied in s. 303, and it can hardly be said that there is one law for juries and another for assessors. The assessors should not be questioned abruptly for their reasons. It is important to see that their opinion is based upon a true understanding of the case, but the Judge must not probe deeper to discover what reasons really actuate the juror or assessor. **(1931) M. W. N. 1139.**

SECTION 317.

Amendment.—(i) In sub-section (1), after the word "Army" the words "or Air Force" shall be inserted; and

(ii) In sub-section (2), for the word "military" in both places where it occurs, the word "official" shall be substituted—**Act X of 1927.**

SECTION 319.

Note.—Jurors and assessors must "Reside" in the district.—A man may obviously reside during the year in more than one district and thus possess more than one place of residence. Such a person would be ordinarily liable to serve as juror or assessor in each of the districts in which he has his residence, but he

would only be subject to that liability so long as he was residing in that district. Where a person actually lived outside the district and rarely visited his home in the district in which he was a juror, he would not be regarded as a resident of that district within the meaning of this section. **A. I. R. 1931 Pat. 160 = 12 P. L. T. 209 = 1931 Cr. C. 400 = 131 I. C. 540 = 32 Cr. L. J. 740 = 16 A. I. Cr. R. 360.**

SECTION 320.

Amendment.—1. After clause (a) the following clause shall be inserted, namely:—

“(aa) Members of either Chamber of the Indian Legislature and members of Legislative Council constituted under the Government of India Act”—**Act XXIII of 1925.**

2. In clause (g) after the word “Army” the words “or Air Force” shall be inserted—**Act X of 1927.**

3. In clause (g) after the word “Army” the word “Navy” shall be inserted—**Act XXXV of 1934.**

SECTION 324.

Note.—Order revising list not a judicial order.—An order by the Sessions Judge and Collector revising the list and adding the name of certain persons is not a judicial order open to revision by the High Court. **A. I. R. 1934 C. 487 = 38 C. W. N. 363 = 36 Cr. L. J. 68 = 152 I. C. 210 = 1934 Cr. C. 695.**

SECTION 326.

Note.—Summoning of less than double the number of jurors required is a mere irregularity.—It is a mere irregularity to summon less than double the number of jurors required for a trial in contravention of the provisions of this section and such irregularity would be generally condoned under s. 537 and a retrial would not be ordered unless it is manifest that there has been a failure of justice, occasioned by it. **10 Pat. 107; 56 A. 210.** The minimum number fixed under this section is not the minimum number of jurors required for every single trial that is to be held during the Session. If a Sessions Judge does not want to summon a large number of jurors for the whole Session but wants to summon only as many jurors as may be required for a particular trial it would be neither illegal nor irregular for him to summon less than 18 persons for a murder trial so long as he takes care to summon a sufficient number of persons to choose the requisite number from among them according to law. **10 Pat. 107.**

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

SECTION 337.

Notes.—1. When pardon can be tendered [*P. 747, n. 5*].—Under this section as it now stands a pardon tendered during the course of investigation is placed on the same footing as a pardon tendered during a Magisterial inquiry. **14 Lah. 507.**

2. Approver's statement can be recorded under s. 164.—Once the approver has accepted a tender of pardon he stands on the same footing as any other witness, with the exception that he is liable to forfeit his tender of pardon if he does not comply with the conditions on which the tender was made. The examination of the approver under s. 164 like any other witness, is not open to any objection. **A. I. R. 1933 Lah. 868 = 35 Cr. L. J. 111 = 148 I. C. 461 = 1933 Cr. C. 1113.** The Magistrate has the power to administer an oath or solemn affirmation to him. **14 Lah. 507.**

PROCEDURE.

3. Sub-sec. (1-A). Effect of failure to record reasons [*See P. 749, n. 14*].—Omission to record the reasons for tendering a pardon is a defect which can be cured under s. 537 unless the omission has occasioned a failure of justice. **1929 A. L. J. 227 = A. I. R. 1929 A. 321 = L. R. 10 A. (Cr.) 64 = 30 Cr. L. J. 1157 = 120 I. C. 126 = 11 A. I. Cr. R. 483.**

4. Sub-section (2). Approver shall be examined as a witness even if he resiles from his position [P. 748, n. 12]—The words of the section are that every person accepting a tender of pardon shall be examined as a witness. No distinction can be drawn between a person who has accepted and a person accepting a tender of pardon. There is no question of a person continuing to accept the tender of pardon. The point to be decided is whether the person did accept a tender of pardon once. His subsequent resiling from the position that he once occupied does not make him cease to be a person accepting a pardon. Where therefore the approver is not examined, the trial and conviction must be quashed. *A. I. R. 1931 Lah. 102 = 31 P. L. R. 1010 = 1931 Cr. C. 166 = 134 I. C. 193 = 32 Cr. L. J. 1126; 11 Lah. 230.* It is the duty of the committing Magistrate to send up the approver as a witness to the Court of Session. *A. I. R. 1935 Oudh 116 = 1935 O. W. N. 44 = 1935 O. L. R. 19 = 153 I. C. 596 = 1935 Cr. C. 206.* But in 61 C. 399 it was held that it was not obligatory upon the prosecution to examine the approver as a witness after he forfeited his pardon.

5. Sub-section (2-A). Approver not to be committed [See P. 749, n. 13 (b)]—The meaning of sub-section (2-A) is simply that where a pardon has been granted to one accused who has been examined as a witness, then the case against the other accused must be committed to the Sessions if a *prima facie* case is established and not tried by the Magistrate himself. The sub-section cannot reasonably be interpreted to mean that the approver must be committed for trial to the Court of Session. *A. I. R. 1932 A. 581 = 1932 A. L. J. 754 = 139 I. C. 408 = 1932 Cr. C. 699 = L. R. 13 A. (Cr.) 148 = 18 A. I. Cr. R. 312 = 33 Cr. L. J. 802; 4 Luck. 679.* The word "accused" in sub-section (2-A) does not include the approver. The sub-section contemplates two individuals, one, the "person" who accepts the pardon; and the other, the "accused," some one who has to stand his trial, and against whom evidence is to be given by the "person." The section does not enable the Court to deal with an approver, in case he does not comply with the pardon and forfeit it, without a fresh inquiry and commitment by a Magistrate. *A. I. R. 1935 B. 70 = 36 Bom. L. R. 1211 = 154 I. C. 327 = 1935 Cr. C. 132.* After the approver has been tendered a pardon and examined even though not on oath, he cannot be committed to the Sessions simply because the approver denied all knowledge of the matter. The error is not a mere formal defect of procedure but is a substantial error of law. *6 Luck. 386; A. I. R. 1935 Oudh 226 = 11 O. W. N. 765 = 1934 O. L. R. 446 = 35 Cr. L. J. 889 = 148 I. C. 1192.*

6. Sub-section (3) refers to the point of time when pardon is tendered.—The word "already" refers to the time when the Magistrate tenders a pardon. If the accused to whom he tenders a pardon is already on bail there is no necessity for the approver to be remanded to custody thereafter. If he is not on bail the Magistrate is bound to retain the approver in custody until the termination of the trial. *A. I. R. 1932 Sind 40 = 33 Cr. L. J. 906 = 140 I. C. 153.*

7. Approver cannot be detained in Police custody.—The approver's position cannot be assimilated to that of an accused so long as he has not forfeited the pardon and he must be regarded as a witness for the purposes of the case. There is no warrant either in principle or in the statute for detaining a witness as such in police custody. There is no reason why a witness, even if he is an approver, should be placed in a worse position than an accused person for even in the case of accused persons detention in police custody is confined within the narrowest limits. The general principles, no less than the rules governing the custody of accused persons, point to the conclusion that an approver cannot be detained in Police custody. He is a "criminal prisoner" as defined in s. 3 (2), Prisons Act, 1894 and s. 4 of that Act imposes upon the Local Government the duty of providing accommodation in prisons as ordained by that Act. *12 Lah. 638; 12 Lah. 604; A. I. R. 1931 Lah. 480 = 1931 Cr. C. 704 = 32 P. L. R. 728 = 135 I. C. 192 = 33 Cr. L. J. 162.*

8. Sub-sec. (3). Approver to be detained in custody till termination of trial and no longer [P. 748, n. 13]—When once the trial in the Court of Session has been terminated under s. 306 the Court has no authority thereafter to order the detention of the approver in anticipation of any possible orders from the Court of Appeal. *62 C. 430.*

ACCOMPLICES AND THEIR EVIDENCE.

9. Accomplice evidence [P. 751, n. 23]—An accused person can legally be convicted upon the uncorroborated evidence of an approver but whether he should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case. *Prima facie* the evidence of an approver being tainted evidence, is unworthy of credit unless it is corroborated in some material particular tending to show that the accused committed the offence with which he is charged. It is for the Court to determine in each case whether the matter before it, tending to corroborate the evidence of the approver is worthy of credence. The evidence of an approver may be corroborated

by the evidence of another approver or by the confession of a person who is being jointly tried with the accused implicating both himself and the accused and it is the duty of the Court to scrutinize with care such corroboration, but whether it is to be treated as evidence against the accused or not is to be determined having regard to the circumstances of the case. 62 C. 238 following 9 Rang. 404. The rule requiring corroboration of the testimony of an approver is not strictly a rule of law, but a rule of practice dictated by prudence. The nature and degree of corroboration must necessarily vary with the circumstances of each case. A. I. R. 1932 Lah. 73 = 32 P. L. R. 792 = 32 Cr. L. J. 1036 = 133 I. C. 545 = 1932 Cr. C. 73 = 17 A. I. Cr. R. 102; 13 P. L. T. 802 = A. I. R. 1933 Pat. 96 = 34 Cr. L. J. 421 = 142 I. C. 809 = 1933 Cr. C. 249; A. I. R. 1934 Sind 78 (2) = 35 Cr. L. J. 1170 = 150 I. C. 917 = 1934 Cr. C. 737. In addition to the general corroboration showing that the approver is truthful and has a good memory, there must be special corroboration connecting each accused individually with the actual commission of the offence. A. I. R. 1932 Lah. 204 = 33 P. L. R. 241 = 33 Cr. L. J. 242 = 136 I. C. 19 = 1932 Cr. C. 248 = 17 A. I. Cr. R. 428; 55 A. 91; 7 Luck. 511; A. I. R. 1932 Oudh 11 = 8 O. W. N. 1240 = 33 Cr. L. J. 287 = 136 I. C. 321 = 1932 Cr. C. 43 = 16 A. I. Cr. R. 441; A. I. R. 1934 Lah. 346 = 36 P. L. R. 121 = 35 Cr. L. J. 1046 = 150 I. C. 21 = 1934 Cr. C. 565; A. I. R. 1935 A. 86 = 152 I. C. 934; A. I. R. 1935 A. 132 = 1935 Cr. C. 185; 15 Lah. 673. It is however not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence. If it were so, it would mean that the approver's evidence can only be used by way of corroboration and that is not the rule. But there must be some evidence which tends to show that the story of the approver is true in so far as it relates to the accused 58 B. 40. The corroboration need not be direct evidence. It is sufficient if it is merely circumstantial evidence of the connection of the accused with the crime, but it must be evidence which tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime was committed but that it was committed by the accused. A. I. R. 1933 Pat. 112 = 1933 Cr. C. 261 = 34 Cr. L. J. 476 = 146 I. C. 934; A. I. R. 1933 Pat. 500. The evidence of one approver cannot be corroborated by the evidence of another approver. It must be corroborated by independent evidence which is free from the taint attached to the evidence of an accomplice. 67 M. L. J. 74 = 50 M. L. W. 237 = 1933 M. W. N. 1129 = A. I. R. 1934 M. 248 = 1933 M. Cr. C. 358 = 35 Cr. L. J. 1040 = 149 I. C. 964 = 1934 Cr. C. 472; but see 62 C. 238, where it was held dissenting from A. I. R. 1934 C. 678 (S. B.) = 38 C. W. N. 777 = 35 Cr. L. J. 1357 = 151 I. C. 486 = 1934 Cr. C. 1045 that the evidence of one approver may be corroborated by the evidence of another approver.

SECTION 339.

Notes.—1. Committal proceedings whether void for want of Public Prosecutor's certificate [P. 759, n. 14]—This section forbids the trial of an accused person without the certificate of the Public Prosecutor. The inquiry by the Magistrate not being a trial, the section is duly complied with on the production of the certificate in the Court of Session. A. I. R. 1935 Oudh 116 = 1935 O. W. N. 44 = 1935 O. L. R. 19 = 153 I. C. 596 = 1935 Cr. C. 206. No sanction can be given under sub-section (3) in the absence of the certificate of the Public Prosecutor. 5 Luck. 452.

2. Statement admitted under sub-sec. (2) must be corroborated.—Although under sub-section (2) the statement of an approver may be admitted in evidence yet it requires corroboration by extrinsic evidence. It is in the nature of a confession and when it is withdrawn, it should be regarded in the light of a retracted confession and must be corroborated in material particulars. A. I. R. 1934 Pesh. 46 = 35 Cr. L. J. 1242 = 151 I. C. 110 = 1934 Cr. C. 882 following 9 Lah. 608.

3. Sanction for prosecution of pardoned persons for perjury [P. 758, n. 12]—In a case where contradictory statements have been made on different occasions, sanction cannot be refused unless it is established that the approver made one of the two statements under undue influence. A. I. R. 1933 Lah. 868 = 1933 Cr. C. 1113 = 146 I. C. 461 = 35 Cr. L. J. 111. The discretion vested in the High Court by sub-section (3) to sanction the prosecution must be exercised with extreme caution. The cardinal question for consideration is whether the confession and the incriminating statement made by the approver were or were not true. If they were not true, the inference must be that they were made under inducement or threat and in such a case it would be opposed to public policy to prosecute and punish the approver for giving false evidence. The exercise of the discretion must depend on the answer to the question whether the confession was or was not voluntary—and all the circumstances must be carefully considered in order to arrive at a conclusion on the point. 56 A. 288. A confessional statement recorded under s. 164 cannot be treated as evidence in a judicial proceeding for the purpose of a conviction under s. 193, I. P. C. (1933) M. W. N. 251.

SECTION 339-A.

Note.—The provisions of the Code requiring a finding to be given as to whether or not the approver had complied with the conditions of his pardon, are compulsory, and failure to comply with the provisions vitiates the trial. *A. I. R. 1929 Oudh 256 = 6 O. W. N. 372 = 30 Cr. L. J. 559 = 116 I. C. 64 = 12 A. I. Cr. R. 431.* But the mere fact that the Court inverted the order of issues as (i) whether the accused is guilty of the offence charged and (ii) if so whether he had complied with the conditions on which the pardon was given and is therefore entitled to an acquittal whether guilty or not, and proceeded to decide the issues in the same order, no irregularity was committed which vitiated the trial. *A. I. R. 1933 Lah. 910 = 1933 Cr. C. 1297 = 146 I. C. 677 = 35 Cr. L. J. 168.*

SECTION 340.

Note.—Access to prisoners by pleader.—*See* note 3 to s. 167.

SECTION 341.

Notes.—1. **Criminal responsibility of deaf-mutes.**—Where the accused was deaf and dumb, owing to the difficulty which he clearly would have in putting forward a defence, the safe course to pursue would be to convict the accused only of the least offence which the prosecution evidence proved. (1934) *M. W. N. 924.*

2. **Section not applicable where accused understands the proceedings** [*P. 762, n. 3*].—A reference under this section can be made only if the accused, though not insane, cannot be made to understand the proceedings. 10 *Lah. 566.*

3. **Magistrate must state his views when making reference** [*P. 762, n. 6*].—It is essential for the Magistrate to record a finding before convicting the accused, to the effect that he had sufficient intelligence to understand the criminal character of his act. *A. I. R. 1930 Lah. 64 = 30 P. L. R. 597 = 30 Cr. L. J. 948 = 118 I. C. 642 = 1930 Cr. C. 32.*

SECTION 342.

Notes.—1. **This section does not apply to inquiry preliminary to commitment** [*See P. 764, n. 2 (ii)*].—Although it is desirable that there should be an examination of the accused in the Court of the committing Magistrate, it need not be under the imperative provisions of this section. S. 209 gives a discretionary power to examine the accused when all the evidence for the prosecution has been taken. Ordinarily in an inquiry in the committing Magistrate's Court, the stage at which the accused is called upon for his defence is not reached. That stage is only reached at the trial in the Court of Session. It cannot therefore be said that the omission to examine the accused in the committing Court is a disregard of an express provision of law. 39 *C. W. N. 289 dissenting* from 23 *M. 636*; 62 *C. 475.*

2. **Court must examine and not prosecutor** [*P. 765, n. 4*].—It is improper for a Magistrate to make use of a document obtained from the Prosecuting Counsel and basing his examination on detailed instructions given therein. *A. I. R. 1933 Nag. 269 = 16 N. L. J. 158 = 34 Cr. L. J. 1172 = 146 I. C. 149 = 1933 Cr. C. 1003.* Where the Magistrate permitted the Prosecuting Inspector to prepare and give a questionnaire which the accused was required to answer, the Magistrate's action was highly improper and was a deliberate non-compliance with the provisions of s. 342 and s. 537 did not apply to the case. *A. I. R. 1934 Nag. 213 = 31 N. L. R. 49 = 35 Cr. L. J. 1487 = 151 I. C. 778 = 1934 Cr. C. 984.*

EXAMINATION IMPERATIVE.

3. **The provision as to the questioning of accused is mandatory** [*P. 765, n. 5*].—It is obligatory on the Magistrate to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him, after all the witnesses for the prosecution has been examined and before he is called on for his defence. Failure to comply with the terms of the section is an illegality vitiating the trial and not an irregularity which can be cured under s. 537. (1930) *M. W. N. 914 = A. I. R. 1931 M. 241 = 3 M. Cr. C. 362 = 32 Cr. L. J. 757 = 131 I. C. 493 = 1931 Cr. C. 361*; *A. I. R. 1933 Lah. 1002 (2) = 34 P. L. R. 798 = 35 Cr. L. J. 104 = 146 I. C. 434 = 1933 Cr. C. 1515*; *A. I. R. 1934 Lah. 415 = 35 Cr. L. J. 1447 = 151 I. C. 913 = 1934 Cr. C. 642*; *A. I. R. 1934 Lah. 631 = 35 P. L. R. 525 = 153 I. C. 446 = 1934 Cr. C. 166*; *A. I. R. 1934 Febh. 75 = 35 Cr. L. J. 1361*

= 181 I. C. 501 = 1934 Cr. C. 1111; A. I. R. 1934 Oudh 457 = 11 O. W. N. 1206 = 1934 O. L. R. 777 = 151 I. C. 840 = 1934 Cr. C. 1308 = 35 Cr. L. J. 1417. Where the accused has been examined, but the examination was not in conformity with the section, the defect will be cured by s. 537. 8 Rang. 372. Where the accused himself made no statement and his pleader disclaimed all knowledge of the facts of the case, it was held that the omission to examine the accused, even if it were only an irregularity, was one which had occasioned a failure of justice. A. I. R. 1934 A. 389 = L. R. 14 A. (Cr.) 444 = 35 Cr. L. J. 784 = 148 I. C. 885 = 1934 Cr. C. 465 = 20 A. I. Cr. R. 394. Failure to examine the accused after the prosecution witnesses were recalled for cross-examination and had been duly examined, vitiates the trial. A. I. R. 1934 Lah. 648 (1) = 35 P. L. R. 173 = 133 I. C. 1034 = 1934 Cr. C. 972. Where the prosecution had closed its case and the accused had been examined under this section the fact that the Court granted the accused the indulgence of further cross-examining some of the prosecution witnesses, does not entitle him to be examined again under this section. 56 C. 1157.

4. Whether it is obligatory to examine the accused again, when fresh witness is examined for the prosecution [See P. 765, n. 5-A]—If a fresh witness is called and examined, the accused must be questioned again. (1930) M. W. N. 914 = A. I. R. 1931 M. 241 = 3 M. Cr. C. 362 = 1931 Cr. C. 361 = 131 I. C. 493 = 32 Cr. L. J. 757; A. I. R. 1932 Sind 165 = 1932 Cr. C. 743. But where the witness did not add materially to the evidence and the omission to further examine the accused did not prejudice him, the trial was not vitiated. A. I. R. 1932 Oudh 113 = 9 O. W. N. 116 = 1932 Cr. C. 186 = 139 I. C. 636 = 18 A. I. Cr. R. 136 = 33 Cr. L. J. 811; A. I. R. 1933 Sind 49 = 34 Cr. L. J. 591 = 143 I. C. 351 = 1933 Cr. C. 175; A. I. R. 1934 Sind 67 = 28 S. L. R. 106 = 35 Cr. L. J. 1175 = 150 I. C. 906 = 1934 Cr. C. 636 = 21 A. I. Cr. R. 326; A. I. R. 1929 Sind 5 = 23 S. L. R. 1 = 29 Cr. L. J. 932 = 111 I. C. 852. Where the accused were all defended by pleaders and when arguments were going on, one of the prosecution witnesses was recalled and a few questions put to him and the pleaders for the accused did not want to adduce further evidence, the mere fact that the formalities were not gone through asking the accused some questions under this section, did not vitiate the trial. A. I. R. 1933 C. 594 = 57 C. L. J. 57 = 1933 Cr. C. 988 = 146 I. C. 1051. Where long after the closing of the case and hearing of arguments the Magistrate examined a witness under s. 540 and admitted into evidence several documents for the prosecution, failure to examine the accused further under this section or to give him an opportunity to rebut the evidence, vitiated the whole trial. A. I. R. 1933 C. 347 = 56 C. L. J. 583 = 1933 Cr. C. 419 = 34 Cr. L. J. 549 = 143 I. C. 285.

5. Whether the section applies to summons-cases [P. 766, n. 5-D]—According to the Rangoon High Court this section does not apply to the trial of summons-cases. 9 Rang. 506 (F. B.) (*Carr. v. contra.*) Where, however, a summons-case was begun as a warrant-case, the case must proceed as such and failure to examine the accused under this section is fatal to the trial. A. I. R. 1933 Nag. 192 = 34 Cr. L. J. 340 = 142 I. C. 393 = 1933 Cr. C. 786. According to the Lahore High Court s. 342 applies to summons-cases as well as summary trials and non-compliance with its provisions amounts to an illegality which vitiates the trial. But if the accused in a summons-case admits that he has committed the offences, the Magistrate might convict him under s. 243 and in such a case examination under s. 342 is unnecessary. 15 Lah. 60. The provisions of this section apply to summons-cases as well. A. I. R. 1935 A. 217 = 1935 A. L. J. 257 = 1935 Cr. C. 260.

6. The imperative provisions of s. 342 do not apply to inquiries under Ch. VIII [P. 766, n. 5-E]—The person proceeded against under Ch. VIII is not an "accused" person. S. 342 is merely confined to a person against whom there is a regular complaint, *i.e.*, an accusation that he has committed an offence, and has no reference to a person against whom information is received of the kind mentioned in s. 110. A. I. R. 1933 Sind 49 = 34 Cr. L. J. 591 = 143 I. C. 351 = 1933 Cr. C. 175.

7. Whether it is obligatory to examine the accused afresh in a *de novo* trial.—Where no new matter had been introduced into the evidence during the *de novo* trial nor was there anything in the evidence at the trial about which the accused had not already given his explanation, it cannot be said that the accused was prejudiced in consequence of the omission to examine him a second time under s. 342. The object of the section is to provide the accused with an opportunity of explaining the matters appearing in the evidence against him. Where this object is fully achieved, the section is complied with. At the most it is only an irregularity to which s. 537 applies. 58 M. 427; (1934) M. W. N. 406.

TIME FOR EXAMINATION.

8. Examination must be before defence commences [P. 767, n. 10]—It makes no difference whether the examination takes place before or after charge, provided the accused are examined after the evidence for

SECTION 339-A.

Note.—The provisions of the Code requiring a finding to be given as to whether or not the approver had complied with the conditions of his pardon, are compulsory, and failure to comply with the provisions vitiates the trial. **A. I. R. 1929 Oudh 256 = 6 O. W. N. 372 = 30 Cr. L. J. 559 = 116 I. C. 64 = 12 A. I. Cr. R. 431.** But the mere fact that the Court inverted the order of issues as (i) whether the accused is guilty of the offence charged and (ii) if so whether he had complied with the conditions on which the pardon was given and is therefore entitled to an acquittal whether guilty or not, and proceeded to decide the issues in the same order, no irregularity was committed which vitiated the trial. **A. I. R. 1933 Lah. 910 = 1933 Cr. C. 1297 = 146 I. C. 977 = 35 Cr. L. J. 168.**

SECTION 340.

Note.—Access to prisoners by pleader.—See note 3 to s. 167.

SECTION 341.

Notes.—1. **Criminal responsibility of deaf-mutes.**—Where the accused was deaf and dumb, owing to the difficulty which he clearly would have in putting forward a defence, the safe course to pursue would be to convict the accused only of the least offence which the prosecution evidence proved. (1934) **M. W. N. 924.**

2. **Section not applicable where accused understands the proceedings** [*P. 762, n. 3*].—A reference under this section can be made only if the accused, though not insane, cannot be made to understand the proceedings. **10 Lah. 566.**

3. **Magistrate must state his views when making reference** [*P. 762, n. 6*].—It is essential for the Magistrate to record a finding before convicting the accused, to the effect that he had sufficient intelligence to understand the criminal character of his act. **A. I. R. 1930 Lah. 64 = 30 P. L. R. 597 = 30 Cr. L. J. 948 = 118, I. C. 642 = 1930 Cr. C. 32.**

SECTION 342.

Notes.—1. **This section does not apply to inquiry preliminary to commitment** [See *P. 764, n. 2 (ii)*].—Although it is desirable that there should be an examination of the accused in the Court of the committing Magistrate, it need not be under the imperative provisions of this section. S. 209 gives a discretionary power to examine the accused when all the evidence for the prosecution has been taken. Ordinarily in an inquiry in the committing Magistrate's Court, the stage at which the accused is called upon for his defence is not reached. That stage is only reached at the trial in the Court of Session. It cannot therefore be said that the omission to examine the accused in the committing Court is a disregard of an express provision of law. **39 C. W. N. 289 dissenting from 23 M. 636; 62 C. 475.**

2. **Court must examine and not prosecutor** [*P. 765, n. 4*].—It is improper for a Magistrate to make use of a document obtained from the Prosecuting Counsel and basing his examination on detailed instructions given therein. **A. I. R. 1933 Nag. 289 = 16 N. L. J. 158 = 34 Cr. L. J. 1172 = 146 I. C. 149 = 1933 Cr. C. 1003.** Where the Magistrate permitted the Prosecuting Inspector to prepare and give a questionnaire which the accused was required to answer, the Magistrate's action was highly improper and was a deliberate non-compliance with the provisions of s. 342 and s. 537 did not apply to the case. **A. I. R. 1934 Nag. 213 = 31 N. L. R. 49 = 35 Cr. L. J. 1457 = 151 I. C. 778 = 1934 Cr. C. 984.**

EXAMINATION IMPERATIVE.

3. **The provision as to the questioning of accused is mandatory** [*P. 765, n. 5*].—It is obligatory on the Magistrate to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him, after all the witnesses for the prosecution has been examined and before he is called on for his defence. Failure to comply with the terms of the section is an illegality vitiating the trial and not an irregularity which can be cured under s. 537. (1930) **M. W. N. 914 = A. I. R. 1931 M. 241 = 3 M. Cr. C. 382 = 32 Cr. L. J. 757 = 131 I. C. 493 = 1931 Cr. C. 361; A. I. R. 1933 Lah. 1002 (2) = 34 P. L. R. 798 = 35 Cr. L. J. 104 = 146 I. C. 434 = 1933 Cr. C. 1515; A. I. R. 1934 Lah. 415 = 35 Cr. L. J. 1447 = 151 I. C. 913 = 1934 Cr. C. 642; A. I. R. 1934 Lah. 631 = 35 P. L. R. 525 = 153 I. C. 446 = 1934 Cr. C. 166; A. I. R. 1934 Feth. 75 = 35 Cr. L. J. 1361**

= 151 I. C. 501 = 1934 Cr. C. 1111; A. I. R. 1934 Oudh 457 = 11 O. W. N. 1206 = 1934 O. L. R. 777 = 151 I. C. 840 = 1934 Cr. C. 1308 = 35 Cr. L. J. 1417. Where the accused has been examined, but the examination was not in conformity with the section, the defect will be cured by s. 537. 8 Rang. 372. Where the accused himself made no statement and his pleader disclaimed all knowledge of the facts of the case, it was held that the omission to examine the accused, even if it were only an irregularity, was one which had occasioned a failure of justice. A. I. R. 1934 A. 389 = L. R. 14 A. (Cr.) 444 = 35 Cr. L. J. 784 = 148 I. C. 885 = 1934 Cr. C. 465 = 20 A. I. Cr. R. 394. Failure to examine the accused after the prosecution witnesses were recalled for cross-examination and had been duly examined, vitiates the trial. A. I. R. 1934 Lah. 648 (1) = 35 P. L. R. 173 = 153 I. C. 1034 = 1934 Cr. C. 972. Where the prosecution had closed its case and the accused had been examined under this section the fact that the Court granted the accused the indulgence of further cross-examining some of the prosecution witnesses, does not entitle him to be examined again under this section. 56 C. 1157.

4. Whether it is obligatory to examine the accused again, when fresh witness is examined for the prosecution [See P. 765, n. 5-A]—If a fresh witness is called and examined, the accused must be questioned again. (1930) M. W. N. 914 = A. I. R. 1931 M. 241 = 3 M. Cr. C. 362 = 1931 Cr. C. 361 = 131 I. C. 493 = 32 Cr. L. J. 757; A. I. R. 1932 Sind 165 = 1932 Cr. C. 743. But where the witness did not add materially to the evidence and the omission to further examine the accused did not prejudice him, the trial was not vitiated. A. I. R. 1932 Oudh 113 = 9 O. W. N. 116 = 1932 Cr. C. 186 = 139 I. C. 636 = 18 A. I. Cr. R. 136 = 33 Cr. L. J. 811; A. I. R. 1933 Sind 49 = 34 Cr. L. J. 591 = 143 I. C. 351 = 1933 Cr. C. 175; A. I. R. 1934 Sind 67 = 28 S. L. R. 106 = 35 Cr. L. J. 1175 = 150 I. C. 906 = 1934 Cr. C. 636 = 21 A. I. Cr. R. 326; A. I. R. 1929 Sind 5 = 23 S. L. R. 1 = 29 Cr. L. J. 932 = 111 I. C. 852. Where the accused were all defended by pleaders and when arguments were going on, one of the prosecution witnesses was recalled and a few questions put to him and the pleaders for the accused did not want to adduce further evidence, the mere fact that the formalities were not gone through asking the accused some questions under this section, did not vitiate the trial. A. I. R. 1933 C. 594 = 57 C. L. J. 57 = 1933 Cr. C. 958 = 146 I. C. 1051. Where long after the closing of the case and hearing of arguments the Magistrate examined a witness under s. 540 and admitted into evidence several documents for the prosecution, failure to examine the accused further under this section or to give him an opportunity to rebut the evidence, vitiated the whole trial. A. I. R. 1933 C. 347 = 56 C. L. J. 583 = 1933 Cr. C. 419 = 34 Cr. L. J. 549 = 143 I. C. 285.

5. Whether the section applies to summons-cases [P. 766, n. 5-D]—According to the Rangoon High Court this section does not apply to the trial of summons-cases. 9 Rang. 506 (F. B.) (*Carr., J. contra.*) Where, however, a summons-case was begun as a warrant-case, the case must proceed as such and failure to examine the accused under this section is fatal to the trial. A. I. R. 1933 Nag. 192 = 34 Cr. L. J. 340 = 142 I. C. 393 = 1933 Cr. C. 786. According to the Lahore High Court s. 342 applies to summons-cases as well as summary trials and non-compliance with its provisions amounts to an illegality which vitiates the trial. But if the accused in a summons-case admits that he has committed the offences, the Magistrate might convict him under s. 243 and in such a case examination under s. 342 is unnecessary. 15 Lah. 60. The provisions of this section apply to summons-cases as well. A. I. R. 1935 A. 217 = 1935 A. L. J. 257 = 1935 Cr. C. 260.

6. The imperative provisions of s. 342 do not apply to inquiries under Ch. VIII [P. 766, n. 5-E]—The person proceeded against under Ch. VIII is not an "accused" person. S. 342 is merely confined to a person against whom there is a regular complaint, *i.e.*, an accusation that he has committed an offence, and has no reference to a person against whom information is received of the kind mentioned in s. 110. A. I. R. 1933 Sind 49 = 34 Cr. L. J. 591 = 143 I. C. 351 = 1933 Cr. C. 175.

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TIME FOR EXAMINATION.

8. Examination must be before defence commences [P. 767, n. 10]—It makes no difference whether the examination takes place before or after charge, provided the accused are examined after the evidence for

the prosecution is completely closed and before they are called on for their defence. **A. I. R. 1930 B. 241 = 32 Bom. L. R. 596 = 31 Cr. L. J. 743 = 124 I. C. 810.**

OBJECT AND SCOPE OF EXAMINATION.

9. **Object and scope of examination** [Sec *P. 767, n. 12; p. 768, n. 14, and p. 769, n. 15*].—It is the duty of the examining Judge to call the attention of the accused, to the vital points of the case. (1934) **M. W. N. 685 (P. C.) = A. I. R. 1933 P. C. 124.** It is impossible to lay down any hard and fast rule as to what questions should be put in any particular case nor would the failure to put certain vital questions vitiate a trial if the accused were in no sense prejudiced by the failure. But in a complicated case it would be an entirely insufficient compliance with the provisions of the section to put a general question asking the accused what he had to say in explanation of the evidence against him. **7 Rang. 821.** When an accused person is being examined by the Court for the purpose of explaining anything in the evidence *against him*, he should not be confronted with the statement he made to the police, for the purpose of being discredited on account of any contradiction. **1935 A. L. J. 385.** The examination ought not to be conducted in the manner of cross-examination of an adverse witness and a Judge or Magistrate is not entitled to establish a sort of a Court of inquisition to force a prisoner to commit himself by making some incriminating or embarrassing admissions or statements, after a series of questions the exact effect of which he may not be able to comprehend. **10 Lah. 223; 8 Rang. 372; A. I. R. 1930 Sind 225 = 31 Cr. L. J. 1036 = 126 I. C. 449 = 1930 Cr. C. 865.** It is not proper for the Court in examining the accused to seek in any way to entrap him into admissions which may fill gaps in the prosecution case. But where the questions were straightforward and the accused were asked whether they had committed the offence and what they had to say, their statements may be taken into consideration. **9 Pat. 504.** The questioning of the accused is not meant to be a lengthy cross-examination as regards all evidence produced by the prosecution. The accused must also confine himself to relevant answers to the questions asked by the Court. The Judge has power to refuse to record irrelevant answers, and, if necessary, may prevent the accused making lengthy irrelevant answers. **55 A. 1040.** The duty of a Judge in examining the accused is a very difficult one and has to be performed with the very greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by Counsel it is often in his interest that the Judge should formally comply with the section by asking a general question and then leave the accused's Counsel to offer explanations on his behalf in the way most favourable and least dangerous to him. **56 M. 231; (1934) M. W. N. 267.**

PROCEDURE.

10. **Written statements must not take the place of the examination** [*P. 770, n. 21*].—The filing of a written statement by the accused after the close of the whole trial cannot be taken to be a substantial compliance with the provisions of this section. (1930) **M. W. N. 914 = A. I. R. 1931 M. 241 = 3 M. Cr. C. 362 = 32 Cr. L. J. 757 = 131 I. C. 493 = 1931 Cr. C. 361.** S. 256 (2) allows an accused to put in a written statement in the trial of a warrant-case in the Magistrate's Court and there is no reason why he should not be allowed to file it in the Court of Session. This would not of course relieve the Court of the necessity of questioning him generally on the case in accordance with ss. 342 and 364 of the Code. Much time of the Court could be saved if such a written statement were adopted. **55 A. 1040.**

11. **Accused need not be examined when his personal appearance is dispensed with** [*P. 770, n. 21-A*].—This section must be read subject to the provisions of s. 205. Where the Magistrate dispenses with the personal attendance of the accused under s. 205 and permits him to appear by his pleader, the Magistrate is not bound to question the accused personally. **A. I. R. 1934 B. 212 = 36 Bom. L. R. 433 = 36 Cr. L. J. 1035 = 149 I. C. 1132 = 1934 Cr. C. 759.** But in **1934 A. L. J. 753** it was held that the provisions of s. 342 were compulsory and a statement made by the Advocate for the accused cannot take the place of a statement by the accused himself. **A. I. R. 1934 A. 693 (2) = 1934 A. L. J. 753 = 3 A. W. R. 443 = 1934 A. L. R. 542 = 35 Cr. L. J. 879 = 148 I. C. 1135 = 1934 Cr. C. 866.**

12. **Sub-section (4). No oath to accused** [*P. 770, n. 22*].—An accused person is incompetent to be a witness, for an oath cannot be administered to him. The question whether the trial is vitiated by the admission of such evidence will depend upon whether the accused was materially prejudiced by the breach of procedure. The effect of non-compliance with the statutory rules of procedure must vary according to the

gravity and the effect of the breach and the test in each case is whether the proceedings have resulted in a miscarriage of justice. 10 Rang. 511 (F. B.) Where no process had been issued against a person and he was therefore never before the Court as an accused, the mere inclusion of his name, in the charge-sheet could not make him an accused for the purposes of s. 342. The evidence of such a person is therefore admissible. 59 B. 355. Sub-section (4) applies only to the conduct of trials and to the examination of the accused at the trial and does not apply to any proceeding outside the trial such as an application to the High Court for transfer. A. I. R. 1933 Nag. 201 = 29 N. L. R. 338 = 34 Cr. L. J. 1035 = 145 I. C. 445 = 1933 Cr. C. 797.

13. **Prohibition in the section not applicable to examination in another case** [P. 770, n. 24]—Sub-section (4) means that for the purposes of this section no oath shall be administered and equally obviously it is restricted to an accused who is on trial in the proceeding to which the section is being applied. The very terms of the section show that it has no application to a person who may be accused in some other proceeding. 55 C. 1214.

14. **The statement of each accused must be recorded separately.**—To record a joint statement from all the accused is not a compliance with this section, for it is quite conceivable that some of the accused may have had a different defence and if so, their explanation of the charge against them must have been shut out by the manner in which the joint statement was recorded. 55 B. 356.

15. **Inference from refusal to answer** [P. 772, n. 30]—Although the prosecution case has to be judged on its merits, an accused person cannot defeat the ends of justice by merely refusing to answer questions. This section clearly provides that the Court may draw such inference from the accused's refusal as it thinks just. Illustration (h) to s. 114, Evidence Act shows that if a man refuses to answer a question which he is not compelled to answer by law, the Court may presume that the answer, if given, would be unfavourable to him. A. I. R. 1931 Lah. 178 = 1931 Cr. C. 298 = 131 I. C. 277 = 32 Cr. L. J. 634 = 16 A. I. Cr. R. 314.

SECTION 344.

Notes.—1. When criminal proceedings to be stayed pending disposal of civil litigation [P. 773, n. 4]—Although generally speaking it is not desirable that civil and criminal litigation between the same parties on substantially the same facts should go on simultaneously, the mere fact that a civil case is pending, is not by itself, a sufficient ground for staying criminal proceedings. Criminal proceedings should generally be stayed if they had been launched with the object of prejudging the trial of the civil suit, and *vice versa*. In such cases the question whether the criminal complaint or the civil suit was instituted first is always important. 58 B. 49; A. I. R. 1933 B. 307 = 35 Bom. L. R. 334 = 1933 Cr. C. 894 = 145 I. C. 181 = 34 Cr. L. J. 900; A. I. R. 1934 Sind 143 = 36 Cr. L. J. 94 = 152 I. C. 382 = 1934 Cr. C. 1150; A. I. R. 1930 Pat. 351 = 11 P. L. T. 310 = 31 Cr. L. J. 766 = 125 I. C. 124 = 1930 Cr. C. 723. There is no invariable rule that criminal proceedings should be stayed pending the decision of a civil suit involving a similar issue. Each case must be considered on its own merits and the only general rule that can be laid down is that every Court should be allowed as far as possible to decide cases before it with the utmost expedition. A. I. R. 1933 Lah. 37 = 33 P. L. R. 1045 = 141 I. C. 66 = 1933 Cr. C. 117 = 34 Cr. L. J. 96. Where the accused was charged with theft and he filed a civil suit for declaration of title to the property and prayed that the criminal trial may be stayed pending disposal of the civil suit, *held* that the Criminal Court will in any case have to decide questions of possession, etc., upon which the judgment of the Civil Court will not operate as *res judicata* and the criminal trial should not be stayed. A. I. R. 1933 Sind 358 = 27 S. L. R. 219 = 147 I. C. 856 = 1933 Cr. C. 1340.

ADJOURNMENT.

2. **Reasonable ground for adjournment** [P. 774, n. 6]—The explanation only describes one type of reasonable cause and there may be cases in which there is a reasonable cause for a remand where the circumstances are not those set out in the explanation, for example, the unavoidable absence of a witness. A. I. R. 1933 C. 752 (2) = 37 C. W. N. 633 = 1933 Cr. C. 1254 = 146 I. C. 167 = 34 Cr. L. J. 1194. In a petty criminal case both parties should appear ready for trial on the first hearing day and Magistrates should refrain from granting adjournments except in cases where they are clearly necessitated for the purposes of justice. 9 Pat. 113.

3. **Postponement of a case "sine die"** [P. 775, n. 10]—On reasonable grounds being established, the Court can postpone the hearing of a case until after the disposal of another pending case or of a civil suit. But

the correct method to do it is for the Court to postpone the case not *sine die* but for fixed and definite periods. **A. I. R. 1932 Sind 214 = 1932 Cr. C. 905 = 141 I. C. 179; A. I. R. 1933 Sind 358 = 27 S. L. R. 219 = 147 I. C. 856 = 1933 Cr. C. 1340.**

COSTS.

4. Adjournment on such terms as the Court thinks fit [*P. 775, n. 12*].—An order requiring the accused to pay the costs of an adjournment is one which a Magistrate in his discretion may make under this section and the High Court will not interfere with such an order if not found to be unreasonable under the circumstances. **56 B. 536.** Where the case has got to be adjourned in any event, as one of the accused was absent, it is improper to order costs to be paid by the accused who was present but who also wanted an adjournment as his Counsel could not be present. **A. I. R. 1934 Lah. 441 = 36 P. L. R. 74 = 36 Cr. L. J. 101 = 152 I. C. 145 = 1934 Cr. C. 699.** A complainant cannot be ordered to pay costs to the accused after charges have been framed, for his failure to produce the prosecution witness for cross-examination. **A. I. R. 1929 Lah. 766 = 30 Cr. L. J. 664 = 116 I. C. 710 = 1929 Cr. C. 466 = 13 A. I. Cr. R. 95.** Where in an application under s. 107 the Magistrate directed the complainant to accompany the process server and on his failure to do so in the case of all the respondents ordered him to pay the costs of the respondents who were present, his order was not one contemplated by this section. It is not the complainant's duty in a criminal proceeding to accompany the process server. **A. I. R. 1933 Lah. 720 = 1933 Cr. C. 941 = 147 I. C. 675.**

5. No costs can be ordered for previous adjournments.—Where the previous adjournments have been granted without any order as to costs or any other terms, it is not open to a Magistrate to impose a penalty in respect of the dates which had already passed. **56 B. 536.**

6. No costs to be ordered when application is made for transfer.—In the case of any application for transfer no order for costs should be made under this section. **56 B. 536.**

7. Costs cannot be allowed in appeal.—The provisions of s. 344 relating to payment of costs does not apply to appeals and costs cannot be awarded for adjourning an appeal. **(1933) M. W. N. 878 (2).**

REMAND OF THE ACCUSED.

8. Report under s. 173 not necessary for action under s. 344.—In order that s. 344 may apply, it is not necessary that the police should send a report under s. 173. Section 170 enables an officer-in-charge of a police station, if there is reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, to forward him under custody to a Magistrate empowered to take cognizance of it. The section does not direct that the report prescribed by s. 173 shall be forwarded at the same time. **53 A. 729.**

9. Detention under s. 167 and remand under s. 344 [*P. 776, n. 15*].—In a case of alleged conspiracy extending over four provinces and involving nearly 66 accused, and witnesses having to be summoned from long distances and the investigation being bound to be prolonged, it is s. 344 which is really applicable and the Court must be guided by the considerations laid down therein and by no others. Under s. 344 the Magistrate has a wide discretion, and provided that he is satisfied that sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence and it appears likely that further evidence may be obtained by a remand for a reasonable period, he undoubtedly has the power to order one. **53 A. 729.**

SECTION 345.

WHAT OFFENCES MAY BE COMPOUNDED.

Notes.—1. Whether case is compoundable depends on offence charged [*P. 780*].—In order to determine whether the case could be considered to be compoundable or not one has to look to the offence with the commission of which the accused was charged in the complaint, or in any case, with which the Court charged them. The case does not become non-compoundable because the facts in the complaint were such that the accused might well have been charged with another offence which could not be compounded. **4 Luck. 669.**

WHO MAY PERMIT COMPOSITION.

2. The Court before which the prosecution is pending is competent to permit composition.—It is not legal for a Magistrate who is seized of the case to make a reference to another Court for instructions whether to accept a compromise or not. **A. I. R. 1935 Lah. 226 = 35 P. L. R. 329 = 35 Cr. L. J. 1372 = 151 I. C. 532; A. I. R. 1930 Lah. 272 = 31 P. L. R. 121 = 32 Cr. L. J. 20 = 127 I. C. 712 = 1930 Cr. C. 304 = 15 A. I. Cr. R. 216.**

3. Court before which appeal is to be heard (Sub-sec. 5) [*P.* 780, *n.* 7]—A compromise made at a late stage after the hearing has been completed, does not come within the provisions of this section. **A. I. R. 1933 A. 434 = 1933 A. L. J. 1493 = L. R. 14 A. (Cr.) 119 = 34 Cr. L. J. 926 = 145 I. C. 126 = 1933 Cr. C. 740 = 19 A. I. Cr. R. 377.**

4. High Court's power in revision to permit compounding of offences [*P.* 780, *n.* 8]—Though sub-sec. (5-A) empowers the High Court to accept a compromise in revision, it does not mean that a Court of Revision should accept a compromise in every case where there has been not only a conviction by the first Court but that conviction has been upheld by a Court of Appeal. **A. I. R. 1934 Sind 122 = 28 S. L. R. 109 = 152 I. C. 412 = 1934 Cr. C. 963.** Where the accused person has been committed for trial or where he has been convicted, he cannot claim as of right that the case against him be withdrawn and that he be acquitted on the ground that the parties had compromised the case and the offence is a compoundable offence. In such a case the Court will be reluctant to grant leave where it finds that the accused person has been rightly committed or convicted. **A. I. R. 1934 Sind 122 = 28 S. L. R. 109 = 152 I. C. 412 = 1934 Cr. C. 963.**

DUTY OF COURT IN CASES OF COMPOSITION.

5. Court must at once give effect to composition [*P.* 782, *n.* 15]—Where the parties represented to the Court that there has been a composition of a compoundable offence and a document in the hand-writing of the complainant himself, signed by all the parties was filed, it was the duty of the Court to forthwith acquit the accused after being satisfied that the parties signed the document and understood its contents. He ought not to adjourn the matter to another date for verification. **52 A. 254.**

Petition of compromise once filed cannot be withdrawn [*N.* 15 (a)]—A composition once effected cannot be withdrawn though a breach of the conditions by either party may give rise to other remedies. **52 A. 254.**

EFFECT OF COMPOSITION.

6. By one accused on another [*P.* 783, *n.* 18]—There is no legal obstacle to the conviction of one accused when another has been acquitted as the result of a composition. **(1933) M. W. N. 222.**

7. Complete bar to further proceedings [*P.* 783, *n.* 19]—*To a suit* [*N.* 19 (iii)]—The effect of compounding, apart from the acquittal of the accused, would be that a suit for damages on the facts constituting the original offence, would not lie. **57 B. 678.**

SECTION 346.

Notes.—1. Superior Magistrate can refer the case back to the Magistrate who submitted it [See *P.* 785, *n.* 6]—The terms of sub-section (2) are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it, if the offence is properly triable by the referring Magistrate himself. **54 M. 16 (F. B.)**

2. Superior Magistrate must, if he elects to try, proceed *de novo* and not act on previously recorded evidence [*P.* 786, *n.* 7]—There is no provision of law under which the superior Magistrate is competent to treat the evidence recorded by the referring Magistrate as evidence in the case. S. 350 has no application in such a case in view of cl. (2) of that section. Failure to proceed *de novo* vitiates the whole trial. **A. I. R. 1933 Sind 191 = 27 S. L. R. 266 = 34 Cr. L. J. 749 = 144 I. C. 231 = 1933 Cr. C. 572.**

SECTION 347.

Note.—Is this section subject to the provisions of Chapter XVIII ? [*P.* 787, *n.* 3]—The Code gives one opportunity to an accused to adduce evidence before the charge is framed and a second to get the charge set aside if he can induce the Magistrate to do so by further defence evidence after the charge. There is no doubt now with the omission of the words "he shall stop further proceedings" in this section that when a Court trying a warrant-case determines to commit the case, it must follow the procedure in Ch. XVIII. **(1932) M. W. N. 634 = 63 M. L. J. 101 = 36 M. L. W. 390 = A. I. R. 1932 M. 502 = 5 M. Cr. C. 197 = 1932 Cr. C. 506 = 139 I. C. 343 = 33 Cr. L. J. 765 ; 52 M. 995.** If before an order for commitment is passed the accused applies to the Magistrate for an opportunity to cross-examine the prosecution witnesses and to examine the defence witnesses and the Magistrate declines to examine the defence witnesses or to allow cross-examination of the prosecution witnesses, the accused might approach the High Court for a direction to the Magistrate to follow the

provisions of Ch. XVIII. But after an order for commitment is passed it must be shown that the accused has been prejudiced by reason of the Magistrate's action. A. I. R. 1931 B. 517 = 33 Bom. L. R. 1192 = 1931 Cr. C. 949 = 134 I. C. 1230 = 33 Cr. L. J. 68.

Right of accused to cross-examine prosecution witnesses [N. 3 (a)]—Where a complaint was made of an offence under s. 363, I. P. C., the prosecution witnesses were examined and cross-examined, a charge was framed under s. 363, all the defence witnesses produced by the accused were also examined and cross-examined, and after the close of the case and before passing orders the Magistrate acting under this section framed a charge under s. 366, I. P. C. and committed the accused, held, that there was no illegality in the procedure adopted. The proceedings must be held to be proceedings in an inquiry under Ch. XVIII and the accused has not been deprived of any right which he could have exercised under Ch. XVIII. He had cross examined all the prosecution witnesses and produced all the defence evidence. The amended charge must be deemed to have been framed under s. 210. 53 A. 692.

SECTION 349.

POWERS OF MAGISTRATE REFERRED TO.

Note.—Magistrate must try the case anew if the nature of the trial is to be altered [See P. 791, n. 8]—Where an Honorary Magistrate tried a case summarily, but referred it to the District Magistrate under this section, and the District Magistrate without taking any further evidence or hearing the case anew sentenced the accused to a year's rigorous imprisonment, it was held that this was in direct conflict with s. 262 (2) which prescribes a maximum of three months' imprisonment for summary trials. The nature of the trial could not be altered by the mere fact of a reference under this section. It might be otherwise if the District Magistrate heard the case *de novo* at full length in accordance with the regular procedure. A. I. R. 1932 A. 507 = 137 I. C. 203 = 33 Cr. L. J. 472 = L. R. 13 A. (Cr.) 91 = 18 A. I. Cr. R. 3 = 1932 Cr. C. 595.

SECTION 350.

Notes.—1. Section applicable to all cases of transfer of proceedings [P. 794, n. 3]—Where the Sessions Judge ordered further inquiry by the Magistrate who originally tried the case and on the evidence already recorded, and the proceedings were transferred by the District Magistrate to another Magistrate, the latter can exercise the powers under sub-sec. (1) and resummon the witnesses and recommence the inquiry. A. I. R. 1930 M. 983 = (1930) M. W. N. 911 = 32 M. L. W. 782 = 3 M. Cr. C. 366 = 32 Cr. L. J. 226 = 129 I. C. 79 = 1930 Cr. C. 1199.

2. Does the section apply to Benches of Magistrates? [P. 795, n. 9]—Section 350 refers to cases heard by a Magistrate sitting singly who is succeeded by another Magistrate sitting singly. Obviously, it contemplates cases in which the second Magistrate is a person other than the first Magistrate, and in which the second Magistrate has not had any previous opportunity of hearing the witnesses. Where therefore in a trial by a Bench of two Magistrates one of whom recorded the depositions, the Bench was dissolved and the case was heard by the Magistrate who had recorded the depositions, no new trial can be claimed. 62 C. 266.

3. Section not applicable to Judges [P. 795, n. 10]—This section has no application to cases tried in a Court of Session and the fact that the accused consented to the succeeding Judge acting on the evidence recorded by his predecessor does not confer jurisdiction. A. I. R. 1930 Rang. 354 = 32 Cr. L. J. 115 = 128 I. C. 354 = 1930 Cr. C. 992.

4. Recommencement of a trial does not imply cancellation of charge already framed [P. 796, n. 13-B]—Where the trying Magistrate did not act *suo motu* but on the request of the accused resummoned and reheard the prosecution witnesses the trial does not become a fresh trial necessitating the framing of a fresh charge. 8 Luck. 286. When a Magistrate is transferred after framing a charge, it is not open to the succeeding Magistrate to ignore the charge. The right of the accused is only to demand that the witnesses or any of them be resummoned and reheard. (1933) M. W. N. 94 = 65 M. L. J. 791 = 33 M. L. W. 995 = A. I. R. 1933 M. 841 = 1933 M. Cr. C. 63 = 35 Cr. L. J. 79 = 146 I. C. 523 = 1933 Cr. C. 1518 following 38 M. 585;

(1934) **M. W. N. 999**. But in **A. I. R. 1931 Nag. 39 = 27 N. L. R. 13 = 32 Cr. L. J. 603 = 130 I. C. 825 = 1931 Cr. C. 223** it was held, *dissenting* from **38 M. 585** that the dismissal of a complaint in a *de novo* trial after the charge was framed by the original Magistrate did not operate as an acquittal attracting the provisions of s. 403 as a *de novo* trial necessarily implies that the charge already framed has to be ignored. *See also A. I. R. 1933 Pesh. 78 = 35 Cr. L. J. 170 = 146 I. C. 443 = 1933 Cr. C. 1311*. Where the succeeding Magistrate commenced the trial after a charge had been framed by his predecessor and the accused had exercised his right of having a fresh examination and cross-examination of witnesses, merely because the charge framed by the former Magistrate was confirmed as it were by the new Magistrate and read over to the accused, the accused does not get a further right of resummoning witness for the purpose of cross-examination. **A. I. R. 1935 M. 258 = (1934) M. W. N. 1357 = 1934 M. Cr. C. 370**.

5. Proviso—Magistrate bound to comply with demand of accused [*P. 796, n. 14*].—Under proviso (a) the accused has an absolute statutory right to claim a *de novo* trial and the Court has no authority to limit that right by imposing any condition on its exercise such as ordering the accused to pay the expenses of the witnesses, etc. **13 Rang. 297**.

6. Does proviso (a) apply to inquiry before the charge is framed? [*P. 796, n. 15*].—For the purposes of this section a trial does not commence at the charge, but commences when the accused appears before the Court. In a warrant-case the accused is entitled to recall witnesses even though no charge has been framed. **A. I. R. 1934 Sind 106 = 28 S. L. R. 239 = 35 Cr. L. J. 1261 = 151 I. C. 213 = 1934 Cr. C. 831**. But *see* **54 M. 512**. In that case after the accused was discharged the Sessions Judge ordered further inquiry. By that time there was a change of Magistrates and the succeeding Magistrate framed a charge without re-examining the witnesses. It was held that the proceedings were proper. There is no distinction between cases where there has been a change of Magistrates in the course of the inquiry and where the inquiry has been closed by one Magistrate by an order of discharge and then reopened by the Sessions Judge when another Magistrate has succeeded. It is the same inquiry and the right under the first proviso to demand the witnesses to be resummoned is confined to trials and not inquiries. In **A. I. R. 1930 C. 666 = 32 Cr. L. J. 243 = 129 I. C. 182 = 1930 Cr. C. 1053**, it was held that where the proceedings were in the nature of an inquiry preparatory to commitment, the necessity of any provision for *de novo* trial did not exist and under s. 350 (1) no such *de novo* trial was necessary when the Magistrate decided to commit the accused under s. 347, as, from that moment, the trial became an inquiry, and s. 350 (1) did not apply to inquiries.

7. When succeeding Magistrate orders *de novo* trial and issues summonses, he has taken cognizance of the case.—Where the accused claimed a *de novo* trial and the succeeding Magistrate issued summonses to the prosecution witnesses, it is not open to the District Magistrate to transfer the case to the file of the Magistrate who had originally tried the case and direct him to continue the trial from the stage at which it was left. The succeeding Magistrate had taken cognizance of the case before it was ordered to be transferred, and whoever is to hear the case under such circumstances, must hear it *de novo*. **57 M. 1019**.

8. Trial not to be commenced *de novo* if accused does not want it.—Though the section enables a Magistrate to resummon the witnesses and recommence the inquiry or trial, that right is subject to the proviso that the accused may when the second Magistrate commences his proceedings demand that the witnesses or any of them be resummoned and reheard. It follows as a corollary from this that if the accused does not wish to have a fresh trial he can insist upon his case being decided upon the evidence already recorded by the first Magistrate. **A. I. R. 1934 Oudh 324 = 11 O. W. N. 825 = 1934 O. L. R. 651 = 35 Cr. L. J. 1147 = 150 I. C. 857 = 1934 Cr. C. 877**.

9. When *de novo* trial is claimed, whether accused can waive their right in respect of particular witnesses.—The use of the phrase "*de novo* trial" is common, but inaccurate. All that the accused can demand is that the witnesses whose evidence has already been demanded or any of them be summoned and reheard. It follows that if the accused after putting forward his demand for the rehearing of the witnesses says he does not want any particular witness to be heard, the Magistrate has no power to order the evidence of that witness to be taken afresh. This is subject to a limitation. If the Magistrate exercises the option given to him under the section of deciding to resummon the witnesses and recommending the inquiry or trial instead of giving judgment on evidence partly or wholly recorded by his predecessor, the accused cannot object to the examination afresh of any witness. **A. I. R. 1935 M. 318 (2) = (1935) M. W. N. 179**.

When the accused in any trial have demanded that the witnesses be recalled, they are at liberty in respect of particular witnesses, if it suits their purpose, to waive their examination or part of it. There is no illegality in the Magistrate permitting the same. **A. I. R. 1934 Nag. 209 = 36 Cr. L. J. 41 = 152 I. C. 236 = 1934 Cr. G. 980.**

10. Effect of transfer to Magistrate not having same jurisdiction.—Where a First Class Bench took up a case on file for summary trial and a charge was orally framed and explained to the accused and the case was subsequently transferred to a Second Class Magistrate who had no summary powers, the case could not be tried by the Magistrate except by means of a *de novo* trial. S. 350 having no application to such trial the oral charge framed by the Bench Court cannot be deemed to be subsisting and an order of discharge by the Magistrate under s. 259 is therefore not an acquittal and will not bar the entertaining of a second complaint. **55 M. 795.**

SECTION 350-A.

Notes.—1. Section does not apply when a member absents himself during trial.—The concluding part of the section makes it clear that all the Magistrates for the time being constituting the Bench must take part in the proceedings, though, if during the pendency of a case the personnel of the Bench undergoes a change the new member can replace an outgoing member without necessitating a fresh trial. Where therefore one of the Magistrates absented himself on some occasions when certain witnesses were examined, the conviction based on such evidence is unsustainable. **A. I. R. 1932 A. 127 = 1932 Cr. C. 152 = 1932 A. L. J. 42 = L. R. 13 A. (Cr.) 15 = 17 A. I. Cr. R. 125 = 135 I. C. 835 = 33 Cr. L. J. 200.** In dealing with the above observation in a later decision of the same High Court, their Lordships expressed their disagreement if it was meant to lay down that all the Honorary Magistrates irrespective of the necessary quorum must be present at all the hearings, or if it was intended to lay down that a newly appointed member can replace an outgoing member on the Bench trying the case without necessitating a fresh trial even when his presence is necessary for the purpose of a quorum. The section is intended to apply to only such cases where one or more members drop out altogether and the remaining Magistrates who constitute the Bench which passes the order or judgment have been present on the Bench throughout the proceedings. If any of the Magistrates constituting the Bench which pronounces the judgment or the order has not been present throughout the proceedings then the section is not complied with. **56 A. 599.**

See note 2 to sections 15 and 16.

2. Effect of non-compliance with the section.—S. 350-A in terms is a saving clause and does not directly prohibit or declare invalid the trial of a case where one of the Honorary Magistrates has not been present throughout the proceedings, but only indirectly or by implication assumes that the trial would be irregular if all the Magistrates constituting the Bench have not been present throughout the proceedings. It is nothing more than an irregularity in the judgment or proceeding within the meaning of s. 537. But where an Honorary Magistrate has not heard the whole evidence and has not been present throughout the proceedings, takes part in the deliberation and joins the others in arriving at the final decision there is every likelihood of his influencing his colleagues. By his absence on some of the material dates he became incompetent to form a true opinion on the merits of the case and if he joins in the deliberations, there is likelihood of a failure of justice. **56 A. 599; 54 A. 413; A. I. R. 1932 Nag. 95 = 15 N. L. J. 11 = 1932 Cr. C. 447 = 138 I. C. 175 = 28 N. L. R. 190 = 33 Cr. L. J. 559 = 18 A. I. Cr. R. 280; A. I. R. 1931 M. 404 = 1930 M. W. N. 770 = 3 M. Cr. G. 221 = 1931 Cr. G. 558 = 133 I. C. 4 = 32 Cr. L. J. 971; A. I. R. 1934 Oudh 85 = 11 O. W. N. 75 = 1934 O. L. R. 132 = 147 I. C. 516 = 35 Cr. L. J. 417.**

SECTION 351.

Note.—Proceedings under this section not controlled by ss. 190 and 191 [P. 798, n. 2].—Where a Magistrate finds that one of the witnesses in the case should be tried as a co-accused for a proper decision of the case and makes a direction accordingly, he does not take cognizance under s. 195 (1) (c) and s. 191 under which the accused is entitled to be tried by another Court, is not applicable. **A. I. R. 1934 Rang. 193 = 38 Cr. L. J. 1312 = 151 I. C. 406 = 1934 Cr. C. 887.**

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

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SECTION 355.

Note.—Section does not apply to summary trials.—In summary cases the recording of evidence is governed by ss. 263 and 264 and s. 355 has no application at all to summary cases. **58 B. 298 following 49 A. 261 and dissenting from 48 C. 280; A. I. R. 1935 Rang. 106.**

SECTION 356.

Notes.—1. **Non-compliance with the provisions of the section—whether a material irregularity** [*P. 802, n. 1*].—Where in proceedings under s. 145 the Magistrate recorded the evidence in English and there was no vernacular record as required by s. 356 (1), provided the irregularity did not go to the root of the trial and the applicants were not prejudiced thereby and provided it did not occasion a failure of justice, it was held that it was a mere technical irregularity which can be cured under s. 537. **53 A. 172; A. I. R. 1931 A. 2 = 1931 Cr. C. 2 = 129 I. C. 265 = 32 Cr. L. J. 368; A. I. R. 1932 Sind 145 = 26 S. L. R. 353 = 1932 Cr. C. 681.** The recording of evidence in a preliminary inquiry by a mere memorandum is a contravention of the provisions of s. 356 and likely to prejudice the accused in the Sessions trial. The commitment was therefore quashed (1934) **M. W. N. 1093.** Where it was clear from the record that the evidence was taken down in the presence and hearing and under the personal direction and superintendence of the Judge and that the depositions of the witnesses were read over and interpreted to them in the presence of the accused and their pleader and admitted to be correct, the omission or irregularity in not making a memorandum as required by sub-sec. (3) is cured by s. 537 as the accused had in no way been prejudiced. **61 C. 399.**

2. **This section does not apply to summary trials.**—This section has no application to the summary trial of a warrant-case under the provisions of Ch. XXII. **13 Rang. 225.**

SECTION 361.

Note.—Sub-sections (1) and (2) are not mutually exclusive. An accused person is often in a much better position than his pleader to follow the drift of the evidence and he ought to be kept informed of what is being said. Therefore when the evidence is given in English it should be translated to the accused even if he is represented by pleader. Failure to do so however, will not vitiate the proceedings if no failure of justice had been occasioned. **A. I. R. 1930 M. 186 = (1929) M. W. N. 898 = 2 M. Cr. C. 252 = 31 M. L. W. 386 = 31 Cr. L. J. 827 = 125 I. C. 253 = 1930 Cr. C. 186.**

SECTION 362.

Note.—**Record of evidence in non-appealable cases not necessary** [*P. 808, n. 4*].—Under sub-section (4) the Magistrate is not bound to record evidence in non-appealable cases and the High Court has no jurisdiction to require him to do what the statute says it is not necessary for him to do. If he likes to record the evidence, that is another matter. **56 B. 200,** where their Lordships expressed the view that the decision in **10 Bom. L. R. 201 = 7 Cr. L. J. 194** was not justified by the terms of the Code and that the Court was not justified in following a decision which is opposed to the plain words of the Statute.

SECTION 364.

Amendment—1. In sub-section (1) after the word “Chapter” the words “or the Chief Court of Oudh” shall be inserted—**Act XXXII of 1925.**

2. In sub-section (1) after the words “Court of Oudh” the words “or the Chief Court of Sind” shall be inserted—**Act XXXIV of 1926.**

Notes.—1. Both the questions put and answers given must be recorded in full [*P.* 811, *n.* 9]—The examination should not be curtailed on the ground that the accused was wasting the time of the Court. When a man is on trial for his life he must be allowed a certain amount of latitude. He may not be very intelligent and may make a long rambling statement, but at least he believes that he is doing something to save his life and it is only fair to him that everything that he wishes to say should be recorded. 1931 Cr. C. 438 = 132 I. C. 228 = 32 Cr. L. J. 854 = A. I. R. 1931 Oudh 166 = 8 O. W. N. 228 = 16 A. I. Cr. R. 478.

2. Formalities to be observed in recording confessions and effect of omissions thereof.—*See* notes under s. 164.—In recording confessions it is important that the formalities of law should be strictly followed. If this is not done, it is not a confession either in form or in substance and in the absence of strong corroboratory evidence it should not be relied upon. A. I. R. 1934 Pat. 651 = 15 P. L. T. 586 = 153 I. C. 922 = 1934 Cr. C. 1322.

SECTION 365.

Amendment.—After the word “Charter” the words “and the Chief Courts of Oudh and Sind” shall be inserted—Act XXXII of 1925 and Act XXXIV of 1926.

CHAPTER XXVI.

OF THE JUDGMENT.

SECTIONS 366 and 367.

II.—DELIVERY OF JUDGMENT.

Notes.—1. Judgment must be delivered by Judge while in office.—Where a Sessions Judge delivered judgment shortly after handing over charge to his successor, it was held that he had no jurisdiction to deliver judgment and the conviction and sentence was therefore bad. 1932 A. L. J. 733. There might be no actual or probable prejudice or failure of justice, but if the trying Magistrate prepared his judgment after he had ceased to have jurisdiction, the defect cannot be cured by invoking the provisions of s. 537 of the Code. A. I. R. 1931 Pat. 386 = 12 P. L. T. 647 = 1931 Cr. C. 914 = 32 Cr. L. J. 1224 = 134 I. C. 625.

2. Judgment should not be delivered by successor in office.—There is no provision in the Criminal Procedure Code corresponding to O. 20, R. 2 of the C. P. C. empowering a Judge to pronounce a judgment written but not pronounced by his predecessor. Such a judgment is one passed without jurisdiction. The judgment of a Criminal Court entails consequences affecting the person more closely than that of a Civil Court and the consequences follow immediately. Hence the necessity of the judgment being delivered by the officer who is responsible for the reasons therefor. 35 C. W. N. 838 = 1931 Cr. C. 837 = 134 I. C. 1265 = 33 Cr. L. J. 60 = A. I. R. 1931 C. 637.

Contra.—The trial of a criminal case is over as soon as the Magistrate has determined the issue of the guilt or innocence of the accused. The mere pronouncing of the judgment is not a part of the trial and there is no irregularity, much less illegality, in the pronouncement of judgment by the successor of the Magistrate who wrote it. (1933) M. W. N. 95 = 36 M. L. W. 881 = A. I. R. 1933 M. 251 (1) = 1933 M. Cr. C. 73 = 34 Cr. L. J. 147 = 141 I. C. 174 = 1933 Cr. C. 365 = 19 A. I. Cr. R. 243.

3. Legality of conviction where judgment written after sentence [*P.* 817, *n.* 11]—It is irregular to pass an informal order of acquittal before the judgment is written and pronounced. It cannot be said that in every such case the irregularity could be cured under s. 537. But where the Magistrate when he did come to write and pronounce judgment was of the same opinion as he had been when he directed the accused to be acquitted and has given his reasons for that opinion based on the evidence in the case it cannot be held that there has been any miscarriage of justice. 55 A. 886.

4. Comment on conduct of parties and witnesses [*P.* 819, *n.* 18]—It may often be the duty of the Judge to comment adversely upon the conduct of an investigation. But great care should be taken that no disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared in the witness-box. A. I. R. 1933 Sind 91 = 34 Cr. L. J. 367 = 27 S. L. R. 13 = 142 I. C. 587 = 1933 Cr. C. 219.

III.—LANGUAGE AND CONTENTS OF JUDGMENT.

5. **Particulars to be given in every judgment** [*P. 819, n. 21*].—*Points for determination*.—The intention of the section is that the Magistrate should direct his own attention to every material question of fact and of law arising in the case. To set out the point for determination as “whether the accused is guilty of the offence with which he stands charged” does not serve any useful purpose. *A. I. R. 1932 Sind 180 = 1932 Cr. C. 795* ; *A. I. R. 1934 Sind 89 = 28 S. L. R. 12 = 36 Cr. L. J. 53 = 151 I. C. 976 = 1934 Cr. C. 748*. See also *A. I. R. 1935 Sind 23 = 28 S. L. R. 295 = 154 I. C. 133 = 1935 Cr. C. 118*. See also *A. I. R. 1933 Nag. 328 = 146 I. C. 447 = 35 Cr. L. J. 136*. A judgment has not to be a resume of the entire evidence or a discussion of the relevancy of all the evidence. A Court is entitled to select such evidence as it considers important and sufficient to prove the point for consideration. *55 A. 1040*.

6. **Judgment should state fairly the evidence for and against the accused.**—It is the duty of the Judge in all cases to state fairly the evidence both for and against each of the accused persons. However anxious a Judge may be that his decision should be upheld on appeal he should never attempt to secure his aim by making the case against an accused person appear to be stronger than the evidence justifies. *55 A. 91*.

7. **Reasons for not passing capital sentence to be stated when accused convicted of offences so punishable** [*P. 821, n. 26*].—The strength of the evidence against the accused is a matter to be considered before but not after conviction. Where the Sessions Judge having convicted the accused of murder by assassination, sentenced them to imprisonment for life instead of to death, for the reason that the evidence was not of a sufficiently convincing character to justify the latter punishment, this was held to be an utterly wrong procedure. *12 Pat. 241 (S. B.)* ; *11 Pat. 807* ; *9 Pat. 474* ; *A. I. R. 1933 Pat. 180 = 14 P. L. T. 96 = 1933 Cr. C. 511 = 142 I. C. 613 = 34 Cr. L. J. 395*. The fact that the assessors gave their opinion that the accused was not guilty, is no reason for passing the lesser sentence when the Judge has disagreed with the opinion of the assessors and convicted the accused. *A. I. R. 1933 Nag. 307 = 146 I. C. 118 = 30 N. L. R. 9 = 34 Cr. L. J. 1168 = 1933 Cr. C. 1265*.

There is no reason to hold that capital sentence should not be passed when the offenders are constructively guilty of murder. *11 Pat. 807*. Where a large number of persons had participated in a matter, all the persons should be sentenced to the extreme penalty and it is only where special circumstances are shown in favour of any individual that he should be sentenced to the alternative punishment of transportation for life. *8 Pat. 181*.

IV.—JUDGMENT ON APPEAL.

8. **Appellate judgment must conform to this section** [*P. 822, n. 30*].—The appellate judgment must comply with the requirements of this section. But the High Court is not invariably bound to interfere in revision because there is an irregularity in the form of a judgment, unless there is some reason to believe that there has been a failure of justice. Where the Appellate Magistrate has at least made it clear that he had perused the evidence and heard arguments and had come to an independent opinion as to the guilt of the accused, the judgment should not be set aside. *A. I. R. 1932 B. 473 = 34 Bom. L. R. 1110 = 33 Cr. L. J. 801 = 139 I. C. 608 = 1932 Cr. C. 601*. S. 367 must be interpreted reasonably, and so long as the lower Appellate Court writes a judgment from which the High Court can gather what the decision of the Appellate Court really was, that in the majority of instances ought to be sufficient. *A. I. R. 1935 C. 316*. Where the Appellate Court wrote a common judgment in two appeals arising from two counter-cases, the conviction was not illegal when the irregularity had not prejudiced the accused. (1934) *M. W. N. 270*. Where the Appellate Court simply stated “the lower Court’s order contains a full statement of the facts and there is nothing for me to describe. The lower Court’s appreciation of evidence in the case appears to me to be correct. The appellant’s pleader’s arguments are not convincing. I do not therefore see any reason to interfere,” it was held to be not a sufficient compliance with the law. *32 Bom. L. R. 353 = A. I. R. 1930 B. 163 = 31 Cr. L. J. 925 = 125 I. C. 710 = 14 A. I. Cr. R. 534*. An Appellate Court in an agreeing judgment need not repeat *in extenso* all that has been stated by the trial Court, but it must write enough to show that it has brought its mind to bear independently on the points raised. (1934) *M. W. N. 119*.

S. 424 makes the provisions of Chapter XXVI applicable to judgments of any Appellate Court other than a High Court. There is therefore no provision which requires that the High Court after pronouncing a judgment in open Court should date and sign the same. S. 425 only requires that the judgment should be certified to the Court below. Where therefore, a Judge of the High Court disposed of criminal appeals by the delivery of judgments in open Court which were taken down by his judgment-writer but died before signing the fair copy, it is in no way a serious defect. 55 A. 132.

V.—RECORD OF CHARGE TO THE JURY.

(See note 1 to s. 297.)

SECTION 369.

Notes.—1. Section does not apply to rejection of appeal.—Where the Sessions Judge “dismissed” the appeal on the ground that a copy of the lower Court’s judgment was not filed as required by s. 419, *held* that the action taken by the Sessions Judge amounted only to a rejection of the appeal and not a dismissal. It cannot be held to be an order amounting to a judgment within the meaning of this section. 56 A. 299.

2. Dismissal of appeal for non-appearance [P. 828, n. 11]—There is no dismissal of a criminal appeal for default of appearance by a party as in a civil case and therefore when an appeal is summarily dismissed deliberately and openly by a Court of competent jurisdiction in the apparent exercise of the powers vested in it under s. 421 it is *prima facie* a judgment, within the meaning of this section. A. I. R. 1935 Sind 84 (F. B.)

3. Whether High Court has power to alter or review its judgment [P. 828, n. 12]—Prior to 1923 all the High Courts were agreed that no power of review lay in criminal cases. The alterations in the Code in 1923 did not have the effect of allowing any power of review. In s. 561-A there is no definite provision for a review of judgment. If a review were intended by the Code there would have been some definite provision of that nature. 56 A. 990.

SECTION 370.

Notes.—1. Clause (i) Reasons for the conviction [P. 830, n. 4]—The record kept by the Presidency Magistrate should furnish some indication that he has considered the evidence in a critical fashion. Merely recording evidence and saying that the case is proved does not fulfil such requirements. A. I. R. 1932 C. 655 = 36 C. W. N. 852 = 1932 Gr. C. 632 = 139 I. C. 244 = 33 Cr. L. J. 729; A. I. R. 1932 C. 64 = 35 C. W. N. 867 = 1932 Gr. C. 12 = 33 Cr. L. J. 265 = 136 I. C. 136. Though a Presidency Magistrate need not give reasons for the conviction when inflicting a fine below Rs. 200, if he should choose to deliver a written judgment, he should come to proper findings on the points which it is the duty of the prosecution to prove. 60 C. 656.

2. Omission to record reasons [P. 830, n. 2]—If the omission to record reasons has not in fact occasioned any failure of justice, s. 537 is applicable. A. I. R. 1932 C. 655 = 36 C. W. N. 852 = 1932 Gr. C. 632 = 139 I. C. 244 = 33 Cr. L. J. 729.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

SECTION 374.

Note.—Practice—High Court must be satisfied on facts as well as law [P. 831, n. 3]—The powers of the High Court in a reference under this section are not limited as they are ordinarily limited in the case of an appeal from a trial held by a jury. It is open to the High Court to come to the conclusion that the finding of the jury is an unsafe finding and not justified by the evidence on record. But the conclusion of the jury must also be given due weight as the Judge and the jury who hear the case have the advantage of seeing the witnesses in the box, the development of the prosecution case, etc. A. I. R. 1931 C. 178 (F. B.) = 128 I. C. 811 = 32 Cr. L. J. 490 = 1931 Cr. C. 242 = 15 A. I. Cr. R. 392 = 34 C. W. N. 1154; A. I. R. 1932 Pat. 302 = 13 P. L. T. 440 = 1932 Cr. C. 774 = 140 I. C. 846 = 34 Cr. L. J. 83; A. I. R. 1933 C. 426 (S. B.) = 37 C. W. N. 595 = 143 I. C. 173 = 1933 Cr. C. 824 = 34 Cr. L. J. 533 = 20 A. I. Cr. R. 20.

SECTION 380.

Note.—Whether superior Magistrate may acquit accused [See *P. 834, n. 4*].—The superior Magistrate cannot acquit the accused. It is not as if the same powers can be exercised by the superior Magistrate under this section as under s. 349. A Magistrate of the Second or Third Class submitting proceedings under s. 349 does not convict but merely expresses his opinion that the accused person is guilty. But when a case is submitted under s. 562, a conviction has first of all to be recorded, and it is not permissible for the Magistrate acting under this section to set aside the conviction and acquit the accused. 57 M. 85.

CHAPTER XXVIII.

OF EXECUTION.

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SECTION 383.

Note.—Commencement of imprisonment cannot be ante-dated [*P. 835, n. 4*].—Nowhere does the Code provide for the ante-dating of a sentence of imprisonment, and such ante-dating seems to be contrary to the spirit of this section and s. 397. A. I. R. 1933 Rang. 28 = 34 Cr. L. J. 447 = 142 I. C. 728 = 1933 Cr. C. 275.

SECTION 386.

Notes.—1. Proviso to sub-section (1)—Liability for fine when imprisonment is undergone in default [See *P. 838, n. 6*].—Under the proviso, if the accused has undergone the whole of the sentence of imprisonment in default, no Court shall issue a warrant except for special reasons to be recorded in writing. The proviso applies in terms only to the issue of a fresh warrant and does not require the withdrawal of a warrant already issued, before the expiration of the sentence in default. The special reasons should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served and any reasons therefor would be relevant. Where the sentence in default had been served before the authorities had taken steps to enforce the warrant by levying execution upon the immovable property of the accused and the subsequent delay was not due to the fault of the authorities, it is a special reason for not withdrawing the warrant. 59 B. 350.

ATTACHMENT AND SALE.

2. Can joint family property be seized in attachment? [*P. 838, n. 10 (ii)*].—There is no conceivable method by which the undivided share of an individual in movable property can be seized in the literal physical sense, without at the same time seizing the undivided shares of other persons, and as the Statute does not authorise the seizure of such other shares, it follows that the undivided share of an individual cannot be seized under sub-sec. (1) (a). 12 Pat. 29 (S. B.) ; 60 C. 932 ; 60 C. 851 ; A. I. R. 1933 Nag. 248 = 29 N. L. R. 320 = 34 Cr. L. J. 1263 = 146 I. C. 371 = 1933 Cr. C. 932. On general principles, the Crown has no right to anything more in joint movable property than the delinquent himself had and it cannot deprive the co-owners, by seizing property, of their right of possession in it. The correct course is that laid down in O. 21, R. 47, Civil P. C. If necessary, either a receiver can be appointed for the delinquent's share or a prohibitory order can be issued against him. His interest in the property can then be brought to sale. Attachment of such property by way of seizure is therefore wrong. 55 M. 1041. On the death of the accused who was a member of a joint Hindu family the surviving members of the family succeed by survivorship to the whole of the properties. Therefore there is no movable property "belonging to the offender," which is liable to attachment under this section. A. I. R. 1932 Pat. 301 (F. B.) = 13 P. L. T. 536 = 1932 Cr. C. 773 = 33 Cr. L. J. 958 = 140 I. C. 72.

3. Salary not drawn cannot be attached.—A Magistrate cannot issue a prohibitory order like one under O. 21, R. 48, Civil P. C. attaching the salary of the accused. S. 386 does not permit the attachment of salary which the salary-earner has not only not drawn, but has not even accrued. It is not "movable property" as used in the section. A. I. R. 1934 Rang. 82 = 1934 Cr. C. 514.

CLAIMS OF THIRD PARTIES.

4. When property is claimed to be joint, proper method is to proceed under sub-sec. (1) (b).—When there is dispute as to whether the property is the separate property of the claimant or joint property of the claimant and the defaulter, the proper method to adopt would be to proceed under clause (b) under which a warrant being issued by the Collector, the Civil Court will proceed to hear and determine the questions in dispute. **A. I. R. 1932 Pat. 212 = 13 P. L. T. 235 = 1932 Cr. C. 493 = 138 I. C. 310 = 33 Cr. L. J. 671; A. I. R. 1933 Sind 43 = 34 Cr. L. J. 354 = 142 I. C. 524 = 1933 Cr. C. 189.**

5. Magistrate's power to inquire into and decide claim [P. 839, n. 11].—The insertion of sub-section (2) by the Amending Act of 1923 shows that it was in the contemplation of the Legislature that claims by third parties should be summarily determined by the Criminal Courts and it would seem to be desirable that rules should be made by the Local Government to obviate unnecessary litigation and possible hardship. In the absence of such rules the sale of the property should be stayed till the claimant establishes his right thereto in a Civil Court. **56 B. 364.**

In the United Provinces, Paragraph 819 of the Manual of Government Orders provides that the inquiry shall be conducted as under O. 21, Rules 58 to 61, Civil P. C. Where therefore a claim is made by a third party it is the duty of the Magistrate to investigate the claim under O. 21, R. 58, Civil P. C. **A. I. R. 1933 A. 135 (1) = 1933 A. L. J. 265 = 1933 Cr. C. 278 = 19 A. I. Cr. R. 281 = L. R. 14 A. (Cr.) 73 = 144 I. C. 883 = 34 Cr. L. J. 847.**

6. Claim cannot be entertained when fine has been realised and credited to Government.—The summary determination of claims under this section is concerned only with the attachment and not with the return of fines after they had been credited to Government and the attachment has ceased. The claim made under sub-sec. (2) must be made promptly and can be entertained only so long as the attachment subsists. If the claim has been preferred while the attachment subsists, the Court must not finally credit the money to Government until the claim has been disposed of. But the summary determination of claims under sub-sec. (2) can only be made when the attachment is subsisting. *Per Full Bench 13 Pat. 317. Kutwant Sahay, J. dissenting.*

SECTION 388.

Note.—Section applies when accused sentenced to fine only.—Where the accused was sentenced to detention till the rising of the Court besides a fine, this section is inapplicable. This section applies when the accused is sentenced to fine only. **56 C. L. J. 73 = A. I. R. 1933 C. 308 = 1933 Cr. C. 408 = 143 I. C. 120 = 34 Cr. L. J. 530; 11 Rang. 451.**

SECTION 391.

Note.—Postponement of whipping illegal [P. 843, n. 3].—The postponement of the sentence of whipping till after the sentence of imprisonment has been undergone is opposed to the terms of sub-section (1) (b) and is illegal. **A. I. R. 1934 Pat. 551 = 15 P. L. T. 475 = 36 Cr. L. J. 100 = 152 I. C. 291 = 1934 Cr. C. 1195.**

SECTION 393.

Notes.—1. Clause (b). Period of imprisonment already undergone not to be computed.—There is no justification for the taking into account of the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping with or without imprisonment is passed, in the computation of the maximum period of imprisonment fixed by this section. **12 Rang. 404.**

2. Clause (b). Sentenced to imprisonment for more than five years.—The word "sentenced" must be read in a general sense, and, if a person is sentenced for any period exceeding the period fixed by the Act whether on conviction in one case or more than one, he cannot be punished with whipping. **7 Rang. 769.**

SECTION 397.

Notes.—1. Sentence for substantive offence must first be carried out before imprisonment in default of security for good behaviour [P. 848, n. 1].—Where the accused who was undergoing imprisonment in default of furnishing security, was convicted for an offence under s. 9, Opium Act committed prior to the

making of such order and the Magistrate sentenced him to a term of imprisonment to commence after the sentence imposed under s. 109 of the Code, *held*, the order was incorrect and after the expiry of the sentence under s. 109 the accused should forthwith be released. *A. I. R. 1933 Oudh 381 = 10 O. W. N. 788 = 34 Cr. L. J. 1152 = 145 I. C. 1007 = 1933 Cr. C. 1098. See also (1934) M. W. N. 928.*

2. "Sentence" includes order under s. 123.—Prior to the passing of the second proviso in 1923, divergent views were held by the High Courts as to whether an order of commitment to or detention in prison under s. 123 was a sentence of imprisonment within this section. This has been set at rest now by the second proviso which refers to the order under s. 123 as a sentence of imprisonment. *9 Rang. 110 (F. B.); 57 M. 928.*

3. Sentence to take effect on expiration, *i.e.*, whether by reversal or completion [*P. 849, n. 7*].—Where a person is convicted in two distinct trials by two different tribunals and on appeal the conviction in one of the cases is set aside, the second sentence commences on the date of the accused's acquittal of the first conviction. Equitable considerations however require that the period of imprisonment already undergone should be deducted from the imprisonment subsequently inflicted in the second trial. The High Court has no power under this section to alter the date on which the second sentence is to commence. But it may under s. 439 make a corresponding reduction in the second sentence. *A. I. R. 1932 Sind 159 = 1932 Cr. C. 695 = 34 Cr. L. J. 24 = 140 I. C. 481.*

4. Sentence of imprisonment in default of payment of fine.—Where the accused was convicted for an offence committed prior to the passing of the order under s. 123 and sentenced to pay a fine or in default, to three months' rigorous imprisonment, the fine not having been paid, the three months' imprisonment must run from the expiry of the order of detention passed under s. 123, for under s. 64, I. P. C. the imprisonment in default of payment of fine is to be in excess of any other imprisonment to which he may have been sentenced. *9 Rang. 612.*

5. High Court has power to act under this section.—The High Court has power under this section to direct separate sentences passed in separate trials to run concurrently. The terms of s. 423 and s. 561-A are wide enough to enable the High Court to make such an order. *A. I. R. 1931 B. 529 (1) = 33 Bom. L. R. 1163 = 1931 Cr. C. 917 = 134 I. C. 1239 = 33 Cr. L. J. 77 (51 A. 888 followed).*

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

SECTION 401.

Note.—Effect of suspension of sentence.—Where certain persons were sentenced to death by a Special Tribunal, and the Special Tribunal directed the sentence to be executed on a certain date, but the Local Government suspended execution of sentence pending an application for leave to appeal to the Privy Council which was eventually dismissed, and it was contended that as the Special Tribunal which alone could issue a fresh order for execution of sentence, had ceased to function, the custody of the prisoners were illegal, it was held that the original warrant committing the prisoners to custody having been legal the question as to what steps can be taken to carry out the sentence is one for the Local Government to decide. The custody of the prisoners was in no sense illegal or improper. *A. I. R. 1931 Lah. 359 = 1931 Cr. C. 631 = 135 I. C. 189 = 33 Cr. L. J. 126.*

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

SECTION 403.

I.—PRELIMINARY.

Notes.—1. Acquittal must be accepted as completely establishing innocence of accused on all facts charged [*P. 853, n. 2*].—When once the accused is acquitted as regards the possession of the articles in question, the Judge is not entitled afterwards in deciding another charge to find that the accused was in fact in possession of the said articles. *A. I. R. 1933 Oudh 470 = 10 O. W. N. 895 = 35 Cr. L. J. 36 = 146 I. C. 354 = 1933 Cr. C. 1393.*

II.—SCOPE OF THE SECTION.

2. **Acquittal in respect of some of several charges—when a bar to retrial on those charges.**—The accused were charged under ss. 333, 225, 147, 323 and 325, I. P. C. They were acquitted of the offences under the first three sections and the Local Government did not appeal against the acquittal. On an appeal by the accused against their conviction on the remaining two charges, the Appellate Court ordered a retrial. The trial Court then proceeded to frame a charge under all the sections under which they were originally charged except s. 147, and convicted them. It was held that a retrial will open up the whole case only in cases falling under s. 236. Where there are two different sets of facts and a verdict has been given on one set which no one impugnes, then it is difficult to see why when an appeal is brought on the other set of facts, the order for retrial should reopen both. The acquittal under ss. 333 and 225, I. P. C. was therefore a bar to their retrial on the same charges. 56 A. 210.

III.—GENERAL RULE OF *AUTREFOIS* ACQUIT OR CONVICT.

BY COURT OF COMPETENT JURISDICTION (P. 858).

3. **Want of territorial jurisdiction is cured by s. 531 and does not affect competency of Court.**—Where the only defect in the jurisdiction of the Court is a want of territorial jurisdiction s. 531 cures the defect, if there has been no failure of justice. An acquittal by such a Court can therefore be set up as a bar to a subsequent trial, under this section. 56 M. 996 (F. B.)

4. **Is want of complaint under s. 195 a condition of the competency of a Court** [P. 859, n. 23]—Where the original trial started on a complaint by an officer who did not come within the description contained in s. 195 (1) (a) the trial was wholly without jurisdiction and a second trial on a proper complaint is not barred. A. I. R. 1934 Pat. 411 (1) = 15 P. L. T. 554 = 35 Cr. L. J. 686 = 148 I. C. 437 = 1934 Cr. C. 882.

5. **Order of Appellate Court setting aside conviction by Magistrate not having jurisdiction does not amount to acquittal.**—When the conviction and sentence passed upon the accused is set aside on the ground that the Magistrate had no jurisdiction to try the accused, the order setting aside the conviction and sentence is no obstacle to the accused being retried on the same charge at the instance of the prosecution. 58 M. 256.

MUST HAVE BEEN CONVICTED OR ACQUITTED (P. 859).

6. **Substance and not form of previous order must be looked to** [P. 859, n. 26]—In an appeal from a conviction, if the Appellate Court reverses the finding and sentence it must either acquit or discharge the accused or order a retrial under s. 423 (b). Where the Appellate Court merely reversed the finding and sentence but did not say that the accused was acquitted nor did it order a retrial, the order must be held to be one of acquittal and the subsequent trial of the accused for the same offences was barred (1933) M. W. N. 224.

Wrong order of acquittal [N. 26 (i)]—If the order of the Sessions Judge is of such a character that the only way in which it can be interpreted is that it was an order of discharge, s. 403 could not operate as a bar to the prosecution of the accused. A. I. R. 1932 C. 633 = 36 C. W. N. 926 = 1932 Cr. C. 636 = 139 I. C. 470 = 33 Cr. L. J. 770. The order that purports to be one of acquittal has to be regarded as one of discharge when under the provision of law that was applied, only an order of discharge could be passed. Where the case against the accused was a warrant-case and the Crown withdrew from the prosecution before a charge was framed, s. 494 (b) was applicable and the accused should have been discharged. The Magistrate however signed a printed form of acquittal through inadvertence. Held that what was intended was only a discharge and it was not a bar to a subsequent trial. (1932) M. W. N. 1230 = 36 M. L. W. 641 = A. I. R. 1933 M. 98 = 5 M. Cr. C. 386 = 34 Cr. L. J. 12 = 140 I. C. 322 = 1933 Cr. C. 129 = 19 A. I. Cr. R. 93.

Order of release not amounting to acquittal [N. 26 (iii)]—In a case where the Magistrate making an order of release, had no intention whatever of "acquitting" the accused, but on the contrary his real intention was that they should ultimately be tried for the offence, although there might have been some defect in form or even an irregularity in the method adopted, it ought not to be held that the accused were in any way prejudiced or that what was done conflicted with natural justice. 60 C. 149.

JUDGMENT MUST BE IN FORCE (P. 860).

7. **Bar only so long as such conviction or acquittal remains in force** [P. 860, n. 27]—When the conviction or acquittal is set aside by a Higher Court, section 403 (1) does not apply. A. I. R. 1929 A. 710 = L. R. 10 A. (Cr.) 108 = 121 I. C. 248 = 1929 Cr. C. 294 = 12 A. I. Cr. R. 118.

IDENTITY OF OFFENCE (P. 860).

8. **Offence must be the same** [P. 860, n. 29].—Where the accused was acquitted on a charge of disobeying a notice to remove an encroachment under the Local Boards Act, another separate or distinct offence is not brought into being by the issue of a subsequent notice when that notice is by the same authority and relates to the same encroachment or contains the same direction. The previous acquittal will operate as a bar to a subsequent trial though a fresh notice to remove the encroachment had been given. *A. I. R. 1935 M. 56 (2)*=(1934) *M. W. N. 1088* = 40 *M. L. W. 834* = 67 *M. L. J. 873* = 1934 *M. Cr. C. 329* = 1935 *Cr. C. 55* = 153 *I. C. 322*. But see (1932) *M. W. N. 632* = *A. I. R. 1932 M. 535* = 36 *M. L. W. 426* = 5 *M. Cr. C. 184* = 33 *Cr. L. J. 626* = 138 *I. C. 488* = 1932 *Cr. C. 552* and (1932) *M. W. N. 860* = 36 *M. L. W. 429* = *A. I. R. 1932 M. 537* = 5 *M. Cr. C. 227* = 33 *Cr. L. J. 629* = 138 *I. C. 491* = 1932 *Cr. C. 525*. Where two persons filed a joint complaint against the accused in respect of two independent transactions affecting them separately and there was a composition in respect of the transaction affecting one of the complainants, the effect of such composition was the acquittal of the accused with reference to that particular transaction. It does not operate as an acquittal with reference to the other transaction and a subsequent complaint by the other complainant is not barred. *A. I. R. 1930 A. 92* = 1930 *A. L. J. 85* = 30 *Cr. L. J. 1149* = 120 *I. C. 117* = 1930 *Cr. C. 81*. Where a judgment-debtor escaped from the custody of the Amin and the decree-holder lodged a complaint against the judgment-debtor which resulted in the acquittal of the judgment-debtor, a subsequent complaint by the Amin in respect of the same offence is barred. *A. I. R. 1930 M. 785 (1)* = 58 *M. L. J. 579* = 31 *M. L. W. 755* = (1930) *M. W. N. 532* = 3 *M. Cr. C. 193* = 32 *Cr. L. J. 27* = 127 *I. C. 645* = 1930 *Cr. C. 896*. When the accused was acquitted of the offence of abduction, he should not subsequently be tried for the offence of rape on the same woman during the abduction in question. The two offences are not so distinct that an acquittal on the first charge will not bar subsequent proceedings on the second. *A. I. R. 1930 Rang. 360* = 32 *Cr. L. J. 205* = 128 *I. C. 843*.

9. **Section does not apply to proceedings under the Legal Practitioners' Act.**—In the case of a person convicted of an offence, and against whom disciplinary action under the Legal Practitioners' Act is taken by the High Court, there is no question of any indictment or trial for the same offence under any other law and there is no question of punishing him over again for that offence. *A. I. R. 1931 Pat. 369* = 12 *P. L. T. 773* = 1931 *Cr. C. 897* = 32 *Cr. L. J. 1256* = 134 *I. C. 945 (F. B.)*

10. **Where on the same facts a charge "might have been framed" under s. 236 and is not framed, subsequent trial for that charge will not lie** [P. 861, n. 32].—An acquittal under s. 302, I. P. C. is a bar to subsequent trial under s. 304, I. P. C. 55 B. 520. The police sent up two separate challans, one under s. 451, I. P. C. and s. 42, Prisons Act and the other under s. 161/511, I. P. C. for offences committed in the same transaction. The Court proceeded with the former charge first and acquitted the accused. It was contended that the acquittal operated as a bar to a trial on the latter charge. *Held* that sub-sec. (2) would enable the Court to hold a second trial in the case of this distinct offence and although evidence with regard to this distinct offence was led in the other trial the Court did not consider the accused's guilt or innocence in respect of this offence, as the question was reserved for a separate trial and in such circumstances even though s. 236 or s. 237, Cr. P. C. might apply, s. 403 (1) was not applicable. *A. I. R. 1934 C. 240* = 35 *Cr. L. J. 1270* = 151 *I. C. 259* = 1934 *Cr. C. 352*.

EXCEPTION I.—DISTINCT OFFENCES UNDER SUB-SECTION (2).

11. **Section does not bar trial for distinct offence for which separate charge might have been made under s. 235 (1)** [P. 863, n. 33].—Clause (2) refers only to sub-section (1) of s. 235. Therefore when a separate charge has been framed against a person under any of the sub-sections other than sub-section (1) of s. 235, he cannot be tried for the separate charge when he has once been convicted or acquitted of one charge. Where the acts alleged against the accused of making a false report, constitute an offence falling within two definitions of the Penal Code, *viz.*, s. 211 and s. 500 and he could be charged with them and tried at one trial of each of such offences under s. 235 (2), his conviction under s. 500 was a bar to a trial under s. 211, I. P. C. 51 A. 977.

Acquittal under s. 379, I. P. C. not a bar to trial under s. 453, I. P. C.—Where on the facts, the accused might have been charged under both ss. 379 and 453, I. P. C. but was only charged under s. 379 and acquitted, he can be subsequently tried under s. 453. *A. I. R. 1932 C. 291* = 35 *C. W. N. 1182* = 1932 *Cr. C. 260* = 137 *I. C. 161* = 33 *Cr. L. J. 439* = 18 *A. I. Cr. R. 107*.

Acquittal or conviction for criminal conspiracy not a bar for trial of acts done in pursuance of the conspiracy and vice versa.—Where the accused were convicted for an offence under s. 120-B, I. P. C., *viz.*,

criminal conspiracy but were not charged with or convicted of the individual acts of cheating which took place in pursuance of that conspiracy, the acts form part of the same transaction and the accused may be charged with and tried at one trial for such offences under s. 235 (1). S. 403 is not therefore a bar to the trial of the accused in respect of the individual acts of cheating. 58 B. 23. Conversely, there is nothing in law to prevent a person acquitted of an offence committed in furtherance of the object of the conspiracy, from being charged subsequently with the offence of conspiracy; only the evidence on which he has been acquitted cannot be received at a subsequent trial on a charge of conspiracy. A. I. R. 1934-A. 61 = 1934 A. L. J. 852 = 1934 Cr. C. 180 = 151 I. C. 442 = 35 Cr. L. J. 1349.

Acquittal under s. 397, I. P. C. is a bar to trial under s. 307, I. P. C.—S. 397, I. P. C. is a combination of several offences, namely, offences under ss. 392, 395, 323, 324, 325, 326 and 307, I. P. C. and a verdict of "not guilty" under s. 397 covers every offence which was stated in it or which could have been charged therein on the same facts. The test is whether separate sentences could have been passed upon the accused on a conviction under s. 397 and s. 307, I. P. C. The answer must be in the negative. If the trial had ended in a conviction under s. 397 he would have been able to plead *autrefois* convict as a bar to his trial under s. 307. The same principle must govern the plea of *autrefois* acquit as well. 57 M. 554.

Acquittal under s. 380 not a bar to trial under s. 467—Where the accused was alleged to have stolen a blank ticket from a railway booking office and forged certain entries in that ticket, he could have been charged under s. 235 (1) with both the offences. Therefore his acquittal under s. 380 was no bar to a subsequent trial under s. 467. 58 M. 178.

Conviction under s. 91-B, Companies Act no bar to prosecution under s. 409, I. P. C.—Where the accused were convicted under s. 91-B, Companies Act, he could be subsequently proceeded against for criminal breach of trust, for the two are distinct offences governed by sub-sec. (2) of s. 403. A. I. R. 1930 Lah. 57 = 30 Cr. L. J. 954 = 118 I. C. 650 = 1930 Cr. C. 25.

Conviction under s. 323, I. P. C. not a bar to trial under s. 3 (12), Towns Nuisances Act—Although the series of acts constituting the two offences may have been the same they are capable of being viewed from two entirely different points of view. The offence of hurt was an offence against the individual. The other was an offence against the public. 55 M. 788.

Charges under ss. 420 and 468, I. P. C. and s. 29, Telegraph Act—Where the accused sent a bogus telegram and thereby dishonestly induced another to send money, he could have been charged under s. 235 (1) with three offences, viz., s. 468, I. P. C., s. 29, Telegraph Act and s. 420, I. P. C. His acquittal on one charge does not bar his trial on the other two charges. A. I. R. 1931 Sind 116 = 25 S. L. R. 9 = 1931 Cr. C. 734 = 134 I. C. 1004 = 33 Cr. L. J. 41.

Acquittal under s. 223, I. P. C. and s. 29, Police Act, no bar to trial under Police Departmental rules—Where the accused, a police sentry, was acquitted of charges under s. 223, I. P. C. and s. 29, Police Act for allowing a prisoner to escape at night, a subsequent prosecution for violating another Departmental rule requiring the sentry to rouse the night-officer, is not barred by virtue of this section as the acts were unconnected. A. I. R. 1933 Pat. 670 = 1933 Cr. C. 1492 = 147 I. C. 773.

12. Acquittal or conviction in respect of some of several sums misappropriated, whether bar to trial in respect of others [P. 865, n. 34]—After a trial for breach of trust in respect of a gross sum between two specified dates, a second trial in respect of an offence alleged to have been committed on intermediate days, but not included in the gross sum is permissible. 53 A. 411. It was however held in 57 C. 17 that where the prosecution knew perfectly well what was the gross sum in respect of which the accused had committed criminal breach of trust in respect of which he could have been charged under s. 222 (2) but the prosecution elected to proceed on three items only and got the accused convicted thereon, they ought not to be allowed to pick up three other items and get the accused tried a second time, though s. 403 does not strictly apply in its terms to such a case. 57 C. 17. But a second trial in such a case is not illegal. Section 222 (2) is an enabling provision which permits what otherwise would be a large number of separate charges, to be joined together for purposes of convenience. It is nowhere prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if the accused had misappropriated several sums within a year they should all be added together and made into one gross sum and tried as one charge. A. I. R. 1930 M. 978 = 59 M. L. J. 854 = 32 M. L. W. 789 = (1930) M. W. N. 1097 = 4 M. Cr. C. 17 = 33 Cr. L. J. 228 = 129 I. C. 75 = 1930 Cr. C. 1194.

EXCEPTION II.—SCOPE OF SUB-SECTION (3).

13. The new facts must have happened after or not known to the Court at the first trial [*P. 866, n. 37*].—Where the accused was convicted of attempted murder and sentenced under s. 307, I. P. C. and the victim died after the conviction, as a result of the wounds inflicted by the accused, a subsequent trial and conviction for murder is not barred. *A. I. R. 1935 Pesh. 18 = 1935 Cr. C. 191.*

EXCEPTION III.—SCOPE OF SUB-SECTION (4).

14. Meaning of “was not competent to try” [*P. 866, n. 38*].—The words “competent to try” are equivalent to “in a legal position to have tried and acquitted or convicted.” They refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence committed by the accused and not broadly to the jurisdiction of the Court with regard to the class of offence in general. Where a person stood up and shouted in Court and beat another with a shoe, his conviction by the Court under s. 228, I. P. C. for interrupting a public servant sitting in a judicial proceeding was no bar to his subsequent trial under s. 355, I. P. C. on a complaint by the person beaten with the shoe, as at the former trial the Magistrate had no cognizance under s. 355 and was therefore not competent to try the accused for that offence. *9 Pat. 585.*

SUB-SECTION (5).

15. Section 26, General Clauses Act, provides that “where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.” This section does not act as a bar to trial or conviction but merely as a bar to duplicated punishment. Where the second trial results in a sentence of imprisonment or transportation, the provisions of s. 26 can be complied with merely by the direction that such imprisonment or transportation shall run concurrently with that imposed in the previous case. In the case of a sentence of death, it automatically cancels the previous sentence of imprisonment. *A. I. R. 1935 Pesh. 18 = 1935 Cr. C. 191.*

SCOPE OF EXPLANATION.

16. Dismissal of complaint [*P. 867, n. 43*].—S. 147 of the old Code provided that “the dismissal of a complaint shall not prevent subsequent proceedings.” It cannot however be argued that the absence of such a provision leads to the inference that the dismissal of a complaint is now a bar to further proceedings until it is set aside. The section ends with the explanation that the dismissal of a complaint is not an acquittal. The only meaning that can be put on the explanation is that an order dismissing a complaint is not an acquittal in the sense that it bars a further inquiry until it has been set aside. *55 M. 622 (F. B.)*; *8 Rang. 1*. Where sometime after the charge was framed the Magistrate found that the complainant had not been examined under s. 200 and being of opinion that it was a fatal defect proceeded to “dismiss the complaint” and directed the complainant thereafter to file another complaint, the dismissal of the complaint will not operate as an acquittal as the order of dismissal of complaint after the charge was framed was wholly ineffective for terminating the trial. *1934 A. L. J. 643 = A. I. R. 1934 A. 877 = L. R. 15 A. (Cr.) 108 = 4 A. W. R. 213 = 1934 A. L. R. 763 = 35 Cr. L. J. 1177 = 150 I. G. 1006 = 1934 Cr. C. 1084 = 21 A. I. Cr. R. 195.*

17. Discharge and its effect [*P. 868, n. 46*].—S. 403 bars the trial of a person for the same offence of which he has been convicted or acquitted. An order of discharge cannot be a bar to the trial of the person discharged for the same offence of which he was discharged, but it would be highly inconvenient to allow successive trials of complaints based on same allegations by different Magistrates and different Courts after a previous complaint on the same facts has been dismissed by a competent Court. It is contrary to sound principles that one Magistrate of co-ordinate jurisdiction should in effect and substance deal with, as if it were an appeal or revision a complaint which had already been dismissed by a competent Magistrate of co-ordinate authority. A trial of such a second complaint is barred. *56 A. 425*. It is only in exceptional circumstances that a second complaint would be entertained. *12 Lah. 9*. It is not desirable that the accused should have been discharged by one Magistrate and without that order being set aside, that he should be convicted by another Magistrate on a fresh complaint. The correct course for the complainant to adopt would be to make an application under s. 436 to the Sessions Judge or the District Magistrate for a further inquiry. *A. I. R. 1935 A. 59 = 36 Cr. L. J. 123 = 152 I. G. 619 = 1935 Cr. C. 38*. But there is no absolute legal bar to

entertaining the second complaint. A second complaint cannot be dismissed on the simple ground that the Court is precluded from trying it because a previous complaint of the same nature has already been dismissed. 1934 A. L. J. 241 = 3 A. W. R. 571 = A. I. R. 1934 A. 514 = 35 Cr. L. J. 1059 = 150 I. C. 376 = 1934 Cr. C. 614; 56 A. 990. See note 5 to s. 203.

When the accused is discharged under s. 259, a fresh complaint is not barred. A. I. R. 1934 Nag. 215 = 36 Cr. L. J. 57 = 152 I. C. 223 = 1934 Cr. C. 986. There is no difference between a discharge where all the evidence had been heard for the prosecution and a discharge where it had not all been heard. A. I. R. 1934 A. 944 = 4 A. W. R. 37 = L. R. 15 A. (Gr.) 140 = 1934 A. L. R. 1066 = 152 I. C. 884 = 1934 Cr. C. 1256 = 21 A. I. Cr. R. 238. When the Crown has withdrawn the prosecution under s. 494 and the accused is discharged, there is nothing to prevent the complainant from filing a fresh complaint. Courts are legally entitled to ignore the orders of discharge passed on the withdrawal of the complaint if they are satisfied that the case is otherwise a fit one to be proceeded with. A. I. R. 1934 Lah. 169 = 1934 Cr. C. 347 = 154 I. C. 73; A. I. R. 1929 Lah. 315 = 30 P. L. R. 58 = 30 Cr. L. J. 233 = 114 I. C. 50 = 12 A. I. Cr. R. 113.

MISCELLANEOUS.

18. Cases where subsequent trial was held barred on general principles, though not under s. 403.—Where the accused had already been previously tried for an offence under the Railways Act, and though not charged also under the Penal Code, the Court had nevertheless took into account the fact that the accused had committed an assault upon the complainant and in consideration thereof had inflicted heavier fines on the accused than upon the other accused who had not committed any assault, it would not be just or proper that he should be again tried in respect of the same matter since it would involve punishment twice over for the same offence. 33 C. W. N. 948 = A. I. R. 1930 C. 60 (1) = 31 Cr. L. J. 613 = 124 I. C. 69 = 1930 Cr. C. 12. Where the accused in one case had been acquitted after a complete trial the Court would rightly exercise its judicial discretion in not proceeding with a second complaint against a different accused on the very same facts even though the plea of *autrefois* acquit would not be available. (1933) M. W. N. 246 following 53 C. 606.

CHAPTER XXXI.

OF APPEALS.

SECTION 404.

Note.—Appeals to the Privy Council [P. 870, n. 11]—The Criminal Procedure Code does not provide for an application for leave to appeal to the Privy Council being entertained by any High Court. Such an application could only be entertained by chartered High Courts under cl. 41 of the Letters Patent. A. I. R. 1933 Nag. 216 = 29 N. L. R. 340 = 34 Cr. L. J. 934 = 145 I. C. 246 = 1933 Cr. C. 798. See note 2 to clause 41, Letters Patent, *infra*.

SECTION 407.

Note.—Appeal from second-class Magistrate invested with first-class powers during trial [P. 872, n. 3]—Where a great part of the trial took place before the Magistrate was invested with first-class powers, the appeal lies to the District Magistrate under this section. A. I. R. 1932 C. 460 = 36 C. W. N. 302 = 1932 Cr. C. 450 = 137 I. C. 854 = 33 Cr. L. J. 516 = 18 A. I. Cr. R. 278.

SECTION 408.

Note.—Clause (b) refers to substantive sentence of imprisonment only.—Where the accused was sentenced by the Assistant Sessions Judge to four years' rigorous imprisonment and whipping, an appeal lies to the Sessions Judge and not to the High Court. The mere fact that the accused has been sentenced to whipping does not alter the position. The clause refers to substantive sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of payment of fine. A. I. R. 1934 Oudh 433 (1) = 11 O. W. N. 1133 = 1934 O. L. R. 717 = 35 Cr. L. J. 1288 = 151 I. C. 289 = 1934 Cr. C. 1311.

SECTION 409.

Note.—Sessions Judge may transfer to Additional Sessions Judge Appeal transferred to the Sessions Judge by the High Court.—The power conferred on the Sessions Judge by the proviso is not limited to appeals arising within the jurisdiction of the Court of Session. The Sessions Judge is competent to make over to the Additional Sessions Judge an appeal transferred to the former by the High Court, in the absence of an express direction by the High Court that the Sessions Judge should hear the appeal himself. **A. I. R. 1934 P. 114 = 15 P. L. T. 318 = 35 Cr. L. J. 1167 = 150 I. C. 927 = 1934 Cr. C. 300.**

SECTION 411.

Note.—No appeal lies when order is passed under s. 562.—Where the accused was convicted and directed to be released on executing a bond for Rs. 200 with one surety of like amount to be of good behaviour for two years and to come up for sentence when required to do so, no appeal lies against the order under this section. **36 C. W. N. 459 = 1932 Cr. C. 480 = 138 I. C. 627 = 33 Cr. L. J. 639 = A. I. R. 1932 C. 488 (1).**

SECTION 412.

Note.—Plea of guilty based on erroneous conception of one's rights in property, not a waiver.—Where an accused person pleads guilty on a charge under s. 380, I. P. C., but the said plea is founded upon an erroneous conception of one's right in the property, s. 412, is inapplicable to the case and cannot shut out one's right of appeal. **53 A. 437.**

SECTION 413.

Notes.—1. **Aggregation of separate sentences in one trial** [*P. 877, n. 4*].—Section 408 grants the right of appeal, and any restriction on that right of appeal must be very strictly construed in favour of the subject. Any restriction that takes away a very substantial right must always be very strictly construed and construed in favour of the subject. Where therefore the Magistrate has passed two sentences of fine of Rs. 40 each, the appeal will be against the conviction. **59 C. 19.** The words "a sentence of fine" must be held to include the cases where the aggregate sentence does not exceed Rs. 50. Where two sentences of fine are passed, it is the aggregate which is to be looked into for determining the right of appeal. **59 C. 1131.**

2. **"Court of Session" includes Additional and Assistant Sessions Judge.**—It does not make any difference whether the Judge who actually presided or exercised jurisdiction is a Sessions Judge, an Additional Sessions Judge or an Assistant Sessions Judge. **(1934) M. W. N. 1091.**

SECTION 414.

Note.—Appeal lies when additional punishment is inflicted.—Where the accused was convicted of an offence under the Motor Vehicles Rules and sentenced to a fine of Rs. 60 and cancellation of license for one year, *held*, that the conviction and sentence were appealable because the sentence entailed a certain punishment in addition to the fine of Rs. 60. **A. I. R. 1933 Rang. 329 = 35 Cr. L. J. 116 = 146 I. C. 545 = 1933 Cr. C. 1146.**

SECTION 415.

Note.—Where, in a summary trial, the accused was fined Rs. 50 under s. 447, I. P. C. and Rs. 20 under s. 24, Cattle Trespass Act it is a case in which two punishments such as are referred to in s. 414 have been combined and an appeal therefrom lies under this section. **7 Luck. 501.**

SECTION 415-A.

Note.—No right of appeal in cases falling under s. 412.—Where the accused pleaded guilty and was convicted and bound over under s. 562, the mere fact that his co-accused were convicted and sentenced will not give him a right of appeal under this section, contrary to the provisions of s. 412. **A. I. R. 1931 Sind 151 = 25 B. L. R. 337 = 32 Cr. L. J. 1142 = 134 I. C. 379 = 1931 Cr. C. 923.**

SECTION 417.

Note.—See note 5 to s. 423 for powers of Appellate Court in appeal against acquittal.

1. **Local Government should prefer appeal expeditiously** [*P.* 879, *n.* 1]—Appeals should be preferred by the Local Government with all reasonable expedition possible. *A. I. R.* 1932 Nag. 121 (*F. B.*) = 1932 Cr. C. 872 = 28 N. L. R. 233 = 33 Cr. L. J. 849 = 140 I. C. 49; 10 Rang. 312.

2. **Local Government should use the power sparingly and with circumspection** [*P.* 880, See *n.* 7]—It is an accepted maxim that the right of appeal against an acquittal vested in the Crown should be used sparingly and with circumspection. *A. I. R.* 1933 M. 230 = 1933 M. Cr. C. 185 = 34 Cr. L. J. 948 = 145 I. C. 371 = 1933 Cr. C. 288. Where the Public Prosecutor had withdrawn the charge under s. 302, I. P. C. in the lower Court, as a consequence of which the accused was acquitted of murder and convicted only of culpable homicide, it would be improper for Government to appeal against the acquittal under s. 302, I. P. C. (1931) *M. W. N.* 873.

3. **Whether an appeal by the Local Government against acquittal for major offence is incompetent after disposal of appeal by accused against conviction for minor offence.**—S. 430 merely means that the judgment of the Appellate Court can be varied by a superior tribunal in the manner specified in s. 417 and Ch. XXXII. It furnishes no authority for the proposition that a Court can vary its own judgment when deciding an appeal under s. 417. When an appeal against the conviction for the minor offence is heard, the appellate tribunal is not competent to consider the correctness of the acquittal for the major offence. The question whether the major offence was committed, is not before the Judge and is not decided. Therefore an appeal under s. 417 can be preferred against the acquittal. If the convict has appealed and the finding and sentence have been reversed with or without an order for retrial, the appeal by Government must fail. The reversal of the finding and sentence is final and no order can be inconsistent with that reversal. If the convict's appeal has been dismissed, any of the orders allowed by s. 423 can be passed on the appeal by Government. In such appeal however, it is open to the accused to question the propriety of his previous conviction and to the Appellate Court to give effect to this plea by making a suitable recommendation to the Local Government if the Court came to the conclusion that no offence was committed. *Per Full Bench.* *A. I. R.* 1932 Nag. 121 = 1932 Cr. C. 672 = 28 N. L. R. 233 = 33 Cr. L. J. 849 = 140 I. C. 49 *dissenting from* *A. I. R.* 1932 Nag. 73 = 1932 Cr. C. 346 = 139 I. C. 63 = 33 Cr. L. J. 728.

SECTION 418.

Notes—1. **Powers of Appellate Court in cases tried with assessors.**—This section provides for an appeal on a matter of fact where the acquittal is by a Judge trying the case with assessors. No condition is imposed on the Appellate Court in an appeal of such a nature that it must find the view of the lower Court perverse. All that the Appellate Court has to see is whether the offence charged is proved against each of the accused persons. 55 A. 689; *A. I. R.* 1933 A. 574 = 1933 Cr. C. 913 = 146 I. C. 244 = 34 Cr. L. J. 1232 = L. R. 14 A. (Cr.) 212 = 20 A. I. Cr. R. 98.

2. **Appeal shall lie on a matter of law only.**—Misdirection or non-direction is a matter of law. If the verdict of the jury is influenced by evidence which was inadmissible or proceeds upon no evidence at all, it is a matter of law. *A. I. R.* 1930 A. 24 = 1929 A. L. J. 1261 = 31 Cr. L. J. 33 = 120 I. C. 264 = 1930 Cr. C. 40.

SECTION 421.

Notes—1. **Procedure on presentation of appeal.**—When an appeal is presented in exercise of the statutory right conferred on the accused, the Court is not entitled to dismiss it summarily in terms of s. 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal and where the appeal is not dismissed summarily, the Court is bound, in order to the disposal of the appeal, to comply with the provisions of s. 422 as to notice, and with the provisions of s. 423 as to sending for the record, if such record is not already in Court. *A. I. R.* 1933 P. C. 89 = (1935) *M. W. N.* 469 (*P. C.*) reversing 61 C. 155 where it was held that it was open to the High Court while dismissing an appeal summarily under s. 421, to reduce the sentence acting in exercise of its revisional powers under s. 439, without calling for the records and without giving notice to the Crown.

2. **Section applies to all appeals including appeal under s. 476-B.**—This section applies to all appeals unless it is specifically provided otherwise. A Magistrate is therefore entitled to dispose of an appeal under s. 476-B summarily. 12 P. L. T. 336 = *A. I. R.* 1931 Pat. 144 = 32 Cr. L. J. 735 = 131 I. C. 536 = 1931 Cr. C. 360 = 16 A. I. Cr. R. 343. See note 7 (iii) to s. 476.

3. Dismissal of appeal merely for absence of appellant is not proper [*P. 886, n. 4*].—A criminal appeal cannot be dismissed in default, and even if the appellant has defaulted, the Appellate Court is not relieved of the duty of hearing the appeal on the merits and deciding it. 11 Lah. 242; A. I. R. 1934 Pesh. 21 = 35 Cr. L. J. 963 = 148 I. C. 1078 = 1934 Cr. C. 522.

4. Appellant or his pleader must be heard [*P. 886, n. 6*].—Where the pleader was heard and the Judge called for the records and on receipt and perusal thereof summarily dismissed the appeal, it was held that if the record is sent for, the Judge should again hear the appellant or his pleader before summarily dismissing the appeal. A. I. R. 1932 C. 397 = 1932 Cr. C. 344 = 138 I. C. 384 = 33 Cr. L. J. 602 following A. I. R. 1926 C. 174 = 99 I. C. 894 = 27 Cr. L. J. 382 and A. I. R. 1926 C. 161 = 93 I. C. 76 = 27 Cr. L. J. 412. In 9 Pat. 768 it was held that though in many cases it may be useful to hear the pleader again to elucidate some point raised by a perusal of the record, there is no illegality in summarily dismissing the appeal without hearing him again. The Court is not bound to send for the papers before taking action under s. 421, and there is also no legal requirement as to postponement of the hearing after the presentation of an appeal so long as a reasonable opportunity is given to the appellant or his pleader to be heard in support of the appeal. 53 M. 865.

5. Summary dismissal of Jail appeal not a bar to hearing of appeal filed by Counsel [See *P. 887, n. 7-A*].—The dismissal of the jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his Counsel heard under the proviso to this section. A summary dismissal of the jail appeal does not debar the hearing of an appeal filed by Counsel. A. I. R. 1934 A. 988 (1) = 4 A. W. R. 344 = 1934 A. L. R. 1115 = 153 I. C. 153 = 1934 Cr. C. 1305.

6. Form of Judgment—whether reasons to be given [*P. 887, n. 15*].—Notwithstanding the provisions of the statute, it is desirable that a final Court of facts should record concisely some reason in order to enable the Court in revision to appreciate the final findings of the Lower Appellate Court on facts and see if any question of law arises on those findings. A. I. R. 1933 C. 515 = 37 C. W. N. 235 = 1933 Cr. C. 859 = 144 I. C. 704 = 34 Cr. L. J. 812; A. I. R. 1930 Pat. 331 = 11 P. L. T. 242 = 31 Cr. L. J. 760 = 125 I. C. 121 = 1930 Cr. C. 616. Where the Appellate Court simply noted "Heard, I see no reason to interfere," it was not a sufficient compliance with the requirements of s. 421 in a case where oral and documentary evidence had been produced by both sides and the memorandum of appeal contained a number of grounds that admitted of argument. 16 P. L. T. 72 = A. I. R. 1935 Pat. 37 = 153 I. C. 152 = 1935 Cr. C. 77; A. I. R. 1935 Pat. 32 = 36 Cr. L. J. 191 = 152 I. C. 801 = 1935 Cr. C. 76. The law does not mean to fetter the discretion of the Court in receiving jail appeals. A Court rejecting an appeal summarily need not give reasons for the same. 53 A. 797; 50 C. L. J. 235 = A. I. R. 1929 C. 773 = 1929 Cr. C. 517.

7. Is order of summary rejection final? [*P. 888, n. 18*].—An order passed under this section dismissing an appeal filed under s. 419 is *prima facie* final. It cannot be vacated under s. 561-A unless it is proved either that the Court has not applied its mind to the merits of the case or that appellant or his pleader has not been afforded an opportunity of being heard. This is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with is on the person challenging the finality of the order. A. I. R. 1935 Sind 84 (F. B.)

SECTION 422.

Notes.—1. Appeal cannot be admitted for limited purposes [*P. 889, n. 1*].—When an appeal is admitted it must be dealt with as a whole. Except in the case mentioned in s. 412 an appeal cannot be admitted on the limited ground of sentence only. If it is admitted at all, the whole appeal must be heard. A. I. R. 1931 Pat. 351 (1) = 12 P. L. T. 539 = 133 I. C. 163 = 1931 Cr. C. 799 = 32 Cr. L. J. 1017. This case was however distinguished in 11 Pat. 697 where it was held that when an appeal was dismissed on all the grounds except the question of sentence, it is not open to the Court to go behind the dismissal subsequently. S. 422 only applies if and in so far as an appeal has not been dismissed summarily. If in part it has not been so dismissed the provision will apply in respect of such part; it cannot however operate to nullify a definite order of dismissal under s. 421.

2. Notice whether obligatory [*P. 889, n. 2*].—The fact that notice of the appeal was not served on the complainant or on the officer appointed under this section, is no ground for interfering with an order of acquittal, where no injustice has been occasioned. (1932) M. W. N. 722 = A. I. R. 1933 M. 277 = 5 M. Cr. C. 230 = 33 Cr. L. J. 596 = 138 I. C. 335 = 1933 Cr. C. 378.

SECTION 423.

II.—PROCEDURE IN HEARING AND DISPOSING OF APPEALS.

Notes.—1. Preliminary objection to trial may be taken for the first time in appeal.—Though the plea that the whole trial is vitiated by an error or illegality has not been raised specifically in the lower Courts and has not been raised in the memorandum of appeal, the appellant must be allowed to raise the plea at the hearing of the appeal when it is contended that the whole trial is vitiated by the alleged illegality or error in the trial of the case in the lower Court. If criminal proceedings are substantially bad in themselves, the fact that the accused or his Counsel waived it or consented to it will not cure the defect. **6 Luck. 386.**

2. Complainant cannot as of right be heard in appeal [*P. 893, n. 9*].—Under this section the only persons who have got a right to be heard in a criminal appeal are the appellant or his pleader and the Public Prosecutor if he appears and in certain cases the accused, if he appears. It cannot therefore be said that a private prosecutor like a complainant has under this section any right to be heard. It is left to the discretion of the Appellate Court to allow the complainant to support the judgment. **35 C. W. N. 976 = 54 C. L. J. 144 = 1932 Cr. C. 9 = 33 Cr. L. J. 305 = 17 A. I. Cr. R. 477 = 136 I. C. 474 = A. I. R. 1932 C. 61.** Where the trial Court convicted the accused and awarded compensation to the complainant under s. 545, when the Appellate Court acquits the accused, it is a grave irregularity and contrary to all sense of fairness, not to give notice or the appeal to the complainant. **(1933) M. W. N. 729.**

3. Right of parties to be heard [*P. 893, n. 10*].—The practice of the Courts, if parties are to be heard at all, is that they must be heard in each others' presence and further, that if the respondent is heard, the appellant shall have a right of reply. **A. I. R. 1932 C. 856 = 36 C. W. N. 699 = 139 I. C. 436 = 33 Cr. L. J. 775 = 1932 Cr. C. 887.**

III.—GENERAL POWERS AND DUTIES OF APPELLATE COURT.

4. Appeal from orders under s. 562.—An appeal does lie from an order passed under s. 562. The fact that s. 423 which defines the powers of an Appellate Court does not contain a provision for setting aside an order under s. 562 does not make such an order non-appealable. It is unnecessary to regard s. 423 as an exhaustive statement of the powers of an Appellate Court or to hold that an appeal from a conviction can only be entertained when the conviction is accompanied by a sentence. **A. I. R. 1935 M. 157 = (1934) M. W. N. 1318 = 41 M. L. W. 22 = 1934 M. Cr. C. 374 = 154 I. C. 879 = 1935 Cr. C. 179.**

See note 10 to s. 562.

IV.—WHAT ARE SUFFICIENT GROUNDS FOR INTERFERENCE.**Appeal against acquittals (P. 896).**

5. Is any difference to be observed in dealing with appeals from acquittals and appeals from convictions? [*P. 896, n. 33*].—There has been a difference of opinion on the question whether in an appeal from an order of acquittal it is not open to the Appellate Court to interfere with the findings of fact of the trial Judge unless it can be said that those findings could not have been reached by him had it not been for some perversity or incompetence on his part. The question has now been set at rest by the decision of the Privy Council in **61 I. A. 398 = 56 A. 645** where their Lordships observed thus:—"There is in their opinion no foundation for the view apparently supported by the judgments of some Courts in India that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice,' or has in some other way so conducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the

accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." Prior to this decision of the Privy Council divergent views were held by the several High Courts as noted below:

Allahabad—The question "what are the conditions which justify an interference with the order of acquittal passed by a lower Court?" was answered by a Full Bench of the Allahabad High Court thus: "If the appellate Court after bearing in mind that there is the presumption of innocence in favour of the accused, still further strengthened by his acquittal, and that the trial Court was in a better position to judge of the credibility of the witnesses examined before it and therefore great weight has to be attached to its view, is nevertheless fully convinced that the conclusion of the trial Court was clearly wrong and its conclusion was contrary to the weight of the evidence, it would be fully justified in setting aside the order of acquittal." 56 A. 354 (F. B.) See also 1931 A. L. J. 1002 = A. I. R. 1931 A. 712/439 = L. R. 12 A. (Cr.) 98 = 32 Cr. L. J. 1073 = 1931 Cr. C. 1048/711 = 16 A. I. Cr. R. 81.

Lahore—There is no difference to be observed between an appeal from an acquittal and an appeal from a conviction. 31 P. L. R. 1026 = A. I. R. 1931 Lah. 18 = 32 Cr. L. J. 485 = 130 I. C. 324 = 1931 Cr. C. 82 = 16 A. I. Cr. R. 109. But to justify interference the indications of error in the judgment of acquittal ought to be clearer and more palpable and the evidence more cogent and convincing in order to justify its being set aside than would be necessary in the case of a conviction. 34 P. L. R. 704 = A. I. R. 1933 Lah. 388 = 34 Cr. L. J. 598 = 143 I. C. 499 = 1933 Cr. C. 632; 34 P. L. R. 1010 = A. I. R. 1933 Lah. 871 = 35 Cr. L. J. 137 = 146 I. C. 665 = 1933 Cr. C. 1116; A. I. R. 1933 Lah. 296 = 1933 Cr. C. 396; 32 P. L. R. 405 = A. I. R. 1931 Lah. 465 = 32 Cr. L. J. 1079 = 133 I. C. 865 = 1931 Cr. C. 689. The High Court must be satisfied that the conclusions of the lower Court are at least manifestly wrong. A. I. R. 1934 Lah. 212 = 35 P. L. R. 75 = 1934 Cr. C. 447 = 147 I. C. 234 = 35 Cr. L. J. 349.

Madras—In appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. 59 M. L. J. 520 = 31 M. L. W. 716 = A. I. R. 1930 M. 704 = 3 M. Cr. C. 203 = 31 Cr. L. J. 897 = 125 I. C. 558 = 1930 Cr. C. 761 = 14 A. I. Cr. R. 514; (1931) M. W. N. 729.

Rangoon—The Code makes no distinction between an appeal against an acquittal and an appeal against a conviction except to this extent, *viz.*, that the High Court should not accept an appeal from an acquittal unless in its opinion it is established beyond all reasonable doubt by the evidence on the record that the respondent is guilty of the offence with which he was charged, and in considering the evidence, due weight ought to be given to the findings of the lower Court and its opinion concerning the effect of the evidence and the credibility of the witnesses. 8 Rang. 671. An appeal against an acquittal would only succeed where the order of acquittal was clearly wrong and involved a miscarriage of justice. 10 Rang. 312; A. I. R. 1933 Rang. 387 = 1933 Cr. C. 1477; A. I. R. 1934 Rang. 44 = 35 Cr. L. J. 855 = 148 I. C. 1069 = 1934 Cr. C. 267.

Oudh—The High Court is loath to interfere with an order of acquittal and will only do so if it is proved without any doubt not only that an accused person is guilty, but that he has been acquitted on unreasonable grounds. 6 Luck. 539; 7 Luck. 511; A. I. R. 1933 Oudh 372 = 10 O. W. N. 742 = 35 Cr. L. J. 66 = 146 I. C. 431 = 1933 Cr. C. 1049; A. I. R. 1933 Oudh 234 = 10 O. W. N. 323 = 34 Cr. L. J. 858 = 144 I. C. 942 = 1933 Cr. C. 560. In an appeal against acquittal, the Crown must satisfy the Court that the guilt of the accused was proved upon the evidence on the record beyond any reasonable doubt. When it had done that, it naturally followed that it had succeeded in proving to the satisfaction of the appellate Court that the grounds given by the Court of Session for acquitting the accused were unreasonable and unsound. A. I. R. 1933 Oudh 340 = 10 O. W. N. 585 = 34 Cr. L. J. 538 = 143 I. C. 129 = 1933 Cr. C. 775; A. I. R. 1934 Oudh 229 = 11 O. W. N. 568 = 1934 O. L. R. 422 = 35 Cr. L. J. 843 = 150 I. C. 514 = 1934 Cr. C. 680.

Sind—There is no distinction between an appeal from conviction and an appeal from acquittal. A. I. R. 1934 Sind 84 = 35 Cr. L. J. 1142 = 150 I. C. 726 = 1934 Cr. C. 743 = 21 A. I. Cr. R. 306.

Peshawar—Before the High Court should intervene, it must be shown not only that the judgment of the lower Court was wrong, but that it was so wrong that its maintenance would constitute a miscarriage of justice. A. I. R. 1933 Pesh. 27 = 34 Cr. L. J. 384 = 1933 Cr. C. 327 = 142 I. C. 312.

VI.—APPEALS FROM CONVICTIONS.**A.—Retrials.**

6. Retrial should not be ordered to enable prosecution to fill up gaps in evidence [*P.* 899, *n.* 44]—A retrial in a criminal case should not be ordered too lightly and should be avoided as much as possible. A retrial should certainly not be ordered where it can be established that there is really no evidence to go before a jury and in a retrial there is always a danger of the prosecution trying to fill up the gaps in the evidence. *A. I. R.* 1935 *C.* 184 (*F. B.*) = 39 *C. W. N.* 368 = 1935 *Cr. C.* 241. Retrial should not be ordered where the prosecution has hopelessly broken down in every respect, so as to enable the prosecutor to substantiate some new charge against the accused or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders retrial. (1930) *M. W. N.* 1215 = 34 *M. L. W.* 975 = *A. I. R.* 1931 *M.* 227 = 4 *M. Cr. C.* 79 = 32 *Cr. L. J.* 749 = 131 *I. C.* 454 = 1931 *Cr. C.* 323 = 16 *A. I. Cr. R.* 370; (1930) *M. W. N.* 191 = *A. I. R.* 1930 *M.* 189 = 3 *M. Cr. C.* 92 = 31 *Cr. L. J.* 422 = 122 *I. C.* 497 = 1930 *Cr. C.* 189 = 14 *A. I. Cr. R.* 246.

7. Retrial cannot be ordered in appeals against orders to give security.—A person ordered to give security is not a convicted person so that sub-sec. (1) (b) does not apply. In the case of an appeal from an order other than an order of acquittal or conviction sub-sec. (1) (c) applies and the Appellate Judge could alter or reverse such order and under sub-sec. (1) (d) make any consequential order that might be just or proper. He could not order a *de novo* inquiry. (1933) *M. W. N.* 241 = *A. I. R.* 1934 *M.* 202 (1) = 1933 *M. Cr. C.* 90 = 34 *Cr. L. J.* 947 = 145 *I. C.* 306 = 1934 *Cr. C.* 351.

8. Is it necessary to order retrial when original trial void for want of jurisdiction? [*P.* 900, *n.* 47]—It is not necessarily the duty of the High Court to order the retrial of a person whose conviction is set aside on account of an illegality in his trial and when the conviction and sentence is set aside by the High Court on the ground that the Magistrate had no jurisdiction to try the accused, the order of the High Court setting aside the conviction and sentence is no obstacle to the retrial of the accused on the same charge. 58 *M.* 256.

9. Appellate Court has no power to direct retrial from a particular point or that a particular charge should be framed [See *P.* 901, *n.* 53]—Where the appellate Court remanded the case for retrial with a direction that charges under ss. 326 and 342, I. P. C. should be framed and the proceedings should commence with the framing of the said charge on the evidence already on record, held that s. 423, does not authorise the Court to direct that a trial shall be resumed at any particular point or that a particular charge shall be framed. (1932) *M. W. N.* 114; *A. I. R.* 1935 *Nag.* 125 (2) = 155 *I. C.* 258.

B.—Committal for Trial.

10. Appellate Court can order commitment in cases not exclusively triable by Court of Session [*P.* 902, *n.* 57]—Where the facts disclose an offence exclusively triable by the Court of Session, the High Court has power to commit the accused for trial by such a Court. 59 *C.* 1233. The appellate Court can also order commitment in cases not exclusively triable by the Court of Session. *A. I. R.* 1933 *Lah.* 128 (2) = 1933 *Cr. C.* 242 = 143 *I. C.* 649 = 34 *Cr. L. J.* 640.

11. Where appellate Court orders committal, no preliminary inquiry needed [*P.* 901, *n.* 56]—It is open to the appellate Court either to commit the accused for trial to the Sessions Court itself or order a Magistrate to commit him for trial under s. 213. In the latter case, the Magistrate cannot make any further inquiry but must only frame a charge under s. 210 and commit the accused. 1935 *A. L. J.* 618 = *A. I. R.* 1935 *A.* 579.

VII.—ALTERATION OF FINDING.—A—Maintaining the Sentence.

12. Appellate Court may alter finding of acquittal into one of conviction [*P.* 902, *n.* 61]—S. 439 is concerned with the powers of a Court in revision when findings of fact are not open to review and a proviso against altering an acquittal into a conviction was expressly added by the Legislature in that section. S. 423 cl (b) is concerned with the powers of the Court in an appeal where the facts are before the Court and in the absence of any proviso limiting the powers given whereby the Court can alter the findings, such a proviso cannot be implied. 60 *C.* 179; *A. I. R.* 1934 *Oudh* 200 = 11 *O. W. N.* 534 = 1934 *O. L. R.* 523 = 35 *Cr. L. J.* 973 = 149 *I. C.* 533 = 1934 *Cr. C.* 587. But see *A. I. R.* 1932 *Oudh* 25 = 8 *O. W. N.* 1299 = 1932 *Cr. C.* 57 = 135 *I. C.* 382 = 33 *Cr. L. J.* 162 = 17 *A. I. Cr. R.* 298, where the observations of the Privy Council in 50 *A.* 722 was held applicable also to

appeals. Where the accused were charged under ss. 304 and 147, I. P. C. but the Sessions Judge directed his attention exclusively to the principal charge under s. 304 and omitted to record a conviction under s. 147 it was open to the High Court in appeal to alter the conviction under s. 304 to a conviction under s. 304 read with s. 149, I. P. C. **55 A. 834.**

13. On appeal High Court may alter finding and enhance sentence under s. 439 [P. 903, n. 62].—The powers relating to appeals under s. 423 are given to the appellate Court and the appellate Court may include a Court subordinate to the High Court, and the appellate Court as such has no power to enhance a sentence. On the other hand, the powers of revision are given to the High Court alone, in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. When the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed and the High Court can then, though the record has come to its knowledge only in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so. **A. I. R. 1935 P. C. 35 = 37 Bom. L. R. 160 = 68 M. L. J. 166 = 60 C. L. J. 593.**

The High Court's power as a Court of Appeal includes all its powers of revision when there is a question of giving relief to the accused appellant. When it is a question of acting against the appellant in enhancing the sentence, that on the face of s. 439 has to be done under the Court's revisional power as distinct from its power merely as a Court of Appeal. **A. I. R. 1931 C. 450 = 35 C. W. N. 184 = 132 I. C. 247 = 1931 Cr. C. 602 = 32 Cr. L. J. 890.** The High Court can therefore alter a conviction under s. 326, I. P. C. to one under s. 302, I. P. C. and enhance the sentence. **A. I. R. 1933 Lah. 661 = 1933 Cr. C. 833 = 146 I. C. 949.**

14. When appellate Court may alter charge or finding and convict accused for offence which his acts properly constitute [P. 903, n. 63].—Where the prosecution was clearly directed towards the establishment of certain acts and the accused endeavoured to meet this accusation and the Court merely misapplied the law, on principle there is nothing to prevent the appellate Court from altering the conviction to a correct offence. S. 423 (1) (b) is not in any way dependent upon or restricted and controlled by ss. 236, 237 and 238 of the Code. **A. I. R. 1933 Pesh. 9 = 34 Cr. L. J. 266 = 142 I. C. 182 = 1933 Cr. C. 151 = 19 A. I. Cr. R. 365.** Where a charge of cheating against the accused was framed in general terms and in the trial Court the case for the prosecution was that the person for attempting to cheat whom the accused was being tried was D but the Sessions Judge altered the conviction holding that the person cheated was N, *held* that the nature of the charge was changed entirely and the accused convicted of an offence which he had no opportunity of meeting and the conviction was therefore illegal. **A. I. R. 1934 Lah. 833 = 35 P. L. R. 666 = 1934 Cr. C. 1180 = 153 I. C. 30.** Where the accused was convicted under ss. 147 and 323, I. P. C. and the appellate Court altered the conviction to one under ss. 147 and 149 read with s. 323, I. P. C. *held* that the conviction under s. 323, read with s. 149, I. P. C. was unsustainable since the accused were not asked to plead to a charge of that nature. (1933) **M. W. N. 910.** When the accused were charged generally that some one or other of them caused hurt but all were guilty by reason of s. 149, I. P. C. it is not open to the appellate Court while holding that there was no riot and no common object, to find them severally guilty of simple or grievous hurt, for, as the charge originally stood, the accused were not concerned in sifting who caused each particular injury. **A. I. R. 1930 M. 631 = 3 M. Cr. C. 207 = 31 Cr. L. J. 1197 = 127 I. C. 298 = 1930 Cr. C. 576 = 15 A. I. Cr. R. 154.** Where the accused were charged under s. 399, I. P. C. and alternatively under s. 402, I. P. C. and the lower Court acquitted the accused under s. 402 but convicted him under s. 399 the High Court can under s. 423 (b) set aside the acquittal under s. 402 and convict the accused under that section when the evidence does not establish the major-offence under s. 399, I. P. C. **9 Luck. 607.**

15. Limitation on power to alter finding [P. 904, n. 64].—*Offence must be one for which accused was charged or might have been charged at trial.*—A person charged with cheating could be convicted of criminal breach of trust by the appellate Court in respect of the same transaction. **A. I. R. 1933 Pat. 26 = 1932 Cr. C. 941 = 142 I. C. 704 = 34 Cr. L. J. 419.** A conviction under s. 302, I. P. C. cannot be altered into one under s. 411, I. P. C. that being an entirely desperate offence with which the accused was not charged. **8 Luck. 518.** A conviction under s. 376, I. P. C. cannot be altered to one under s. 323, I. P. C. **A. I. R. 1934 Lah. 178 = 34 P. L. R. 787 = 35 Cr. L. J. 519 = 147 I. C. 799 = 1934 Cr. C. 402.** Offences under ss. 398 and 392, I. P. C. are cognate offences and therefore s. 237, read with s. 236, justifies a conviction under s. 398, I. P. C. being altered to one under s. 392, I. P. C. **7 Luck. 543.**

Power to alter finding is subject to the provisions of s. 199.—Where the accused was convicted under s. 376, I. P. C. the appellate Court cannot alter the conviction to one under s. 497, I. P. C. in the absence of a complaint by the husband as required by s. 199. **A. I. R. 1933 Oudh 163 = 10 O. W. N. 107 = 34 Cr. L. J. 496 = 143 I. C. 73 = 1933 Cr. C. 318 = 19 A. I. Cr. R. 156.**

Appellate Court may convict for abetment when accused is acquitted of main offence [See n. 63 (iv)]—Where the accused was acquitted of an offence under s. 376, I. P. C. but there was no charge under s. 376/511, I. P. C. and consequently no acquittal under that charge, the appellate Court can convict him of an offence under s. 376/511. Even if there was an acquittal, the words “alter the finding” are wide enough to empower the appellate Court to convict the accused of an offence of which the lower Court acquitted him. **60 C. 179; 7 Luck. 102; A. I. R. 1935 Pesh. 67.** Where the accused were convicted of the substantive offence of theft, it is not open to the appellate Court to alter it into a conviction of abetment of theft holding that they were proved to have instigated the other accused to commit theft, when in fact the latter had been acquitted of theft by the lower Court. (1932) **M. W. N. 1216.**

VIII.—ALTERATION OF NATURE OF SENTENCE SO AS NOT TO ENHANCE SAME.

16. Where conviction on one of several charges is reversed, sentence must also be set aside [*P. 906, n. 69*].—Where the accused was convicted by the trial Magistrate under ss. 147 and 323, I. P. C. and sentenced to rigorous imprisonment for six months for the first offence and a fine of Rs. 100 for the second and the appellate Court quashed the conviction under s. 147 and altered the conviction under s. 323 to one under s. 325 and sentenced him to rigorous imprisonment for six months and a fine of Rs. 100 for that offence, *held* this was tantamount to enhancement of sentence and therefore beyond the powers of the appellate Court. **A. I. R. 1933 Lah. 933 (4) = 1933 Cr. C. 1392 = 146 I. C. 442.** It does not however follow that if the conviction on one of several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a reduction of sentence. It depends on the circumstances of the particular case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of sentence. **A. I. R. 1930 Pat. 79 = 10 P. L. T. 587 = 31 Cr. L. J. 173 = 1930 Cr. C. 38 = 120 I. C. 764.**

17. Is whipping more severe than imprisonment [*P. 907, n. 72*].—Provided the effect of the change is not to enhance the sentence, it is open to an appellate Court to alter a sentence of imprisonment into one of whipping where the offence is punishable with whipping in lieu of any other punishment. In **7 Rang. 319 (F. B.)** it was laid down as a rule of practice, not of law, that ordinarily the substitution of sentences of 30, 25 and 20 stripes for sentences of one year's, nine months' and six months' rigorous imprisonment or more respectively, would not amount to enhancement of the sentence. In altering the sentence to one of whipping regard should be had to the period of imprisonment already undergone by the prisoner. **10 Rang. 317.** Where the trial Court had no power to order whipping, substitution of whipping for imprisonment by the appellate Court amounts to enhancement. **A. I. R. 1930 Lah. 318 (1) = 31 P. L. R. 264 = 31 Cr. L. J. 166 = 120 I. C. 787 = 1930 Cr. C. 350.**

Substitution of imprisonment for whipping—Where the accused was illegally sentenced to whipping in addition to imprisonment in a case where whipping can be inflicted only in lieu of imprisonment, it is open to the appellate Court to set aside the sentence of whipping, but it cannot substitute for it a further period of imprisonment. The substitution of a legal sentence for the illegal part of a sentence does amount to enhancement. **12 Rang. 607.**

18. Reduction of imprisonment with increase of fine [*P. 907, n. 73*].—The accused was sentenced to a year's rigorous imprisonment and fine of Rs. 50 or six months' further imprisonment in default. The appellate Court altered the sentence to six months' rigorous imprisonment and fine of Rs. 500 or six months' further rigorous imprisonment in default. It was held not to be an enhancement. **12 Lah. 449.** Where a sentence of three months' rigorous imprisonment was altered in appeal into one of one month's rigorous imprisonment and a fine of Rs. 60 with a further two months' rigorous imprisonment in default of payment, it was in effect a reduction of sentence. The proper test is whether the accused really considers a fine of Rs. 60 a heavier sentence than two months' rigorous imprisonment. **A. I. R. 1930 M. 193 = (1929) M. W. N. 896 = 3 M. Cr. C. 24 = 31 Cr. L. J. 203 = 121 I. C. 125 = 1930 Cr. C. 86.**

X.—POWER TO MAKE ANY AMENDMENT OR CONSEQUENTIAL OR INCIDENTAL ORDER.

19. Orders under s. 107 and 118 may be stayed under this section.—Clause (1) (*d*) is in the very widest terms and an order dispensing with security pending an appeal which possibly may be successful, may be said to be an incidental order that may be just or proper. 54 A. 861.

20. Power to order restoration of property ss. 517-520 [*P.* 910, *n.* 87].—Under s. 423 (1) (*d*) as well as s. 520, the appellate Court has jurisdiction to pass an order regarding the disposal of movable property even when the trial Court has not passed any such order. (1934) M. W. N. 956.

XI.—LIMITATION ON APPELLATE COURT'S POWER TO INTERFERE WITH VERDICT OF JURY, SUB-SEC. (2).

21. Scope of sub-section (2) [*P.* 912, *n.* 95].—Before the High Court can interfere with the verdict of the jury, it must be reasonably satisfied that not only has the learned Judge misdirected the jury but that his misdirection has caused them to come to a conclusion which is in fact wrong. 59 C. 1361.

22. Power of High Court in jury trials [*P.* 913, *n.* 101].—*When verdict of jury is set aside, High Court is not bound to order retrial*.—The appellate Court has power in the event of any misdirection or admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction, or where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion without hearing the witnesses, a new trial may be ordered. A. I. R. 1933 B. 153 = 33 Bom. L R. 174 = 1933 Cr. C. 465. If there has been a misdirection and the High Court is of opinion that the verdict of the jury is erroneous owing to that misdirection and that it has in fact occasioned a failure of justice, the High Court may, in a proper case, deal with the whole case itself. 58 C. 96.

SECTION 424.

Notes.—1. Appellate Court must record its findings on questions of fact [*P.* 915, *n.* 3].—The Code provides for an appeal on a matter of fact (s. 418) and in such a case it is the duty of the Court of Appeal to examine the evidence and come to a finding of its own on the question whether the evidence is sufficient to warrant a conviction. 11 Pat. 143.

2. Appellate judgment must substantially comply with the provisions of s. 367.—Whether a judgment of the Court of Appeal substantially complies with the requirements of s. 367 is a question depending on the facts of each case. In a simple case strict compliance with the rule contained in s. 367 regarding the absence of detailed reasons for coming to a decision will not be a non-compliance with the law. But where the facts are intricate and the evidence is contradictory, the appellate Court should set out the points for decision, the decision and the reasons for the decision with sufficient clearness in order to enable the High Court in revision, to satisfy itself that the matter has been properly considered by the Court of Appeal. But, if on a perusal of the judgment the High Court is satisfied that the appellate Court did consider the evidence and came to an independent finding of its own it will not interfere, merely because the reasons are not set out in detail. 11 Pat. 143.

See note 8 to s. 367.

SECTION 426.

Note.—This section applies to proceedings under s. 107.—Persons against whom an order is passed under s. 107 cannot be said to be convicted of an offence. But such a narrow construction need not be given to the words "convicted person" in this section. S. 406 gives a right of appeal in such cases and the words "convicted person" in this section should be held to include persons against whom an order has been passed by a Criminal Court from which there is an appeal allowed. Even if this section does not apply, the order to furnish security can be stayed under s. 423 (1) (*d*). 54 A. 861. But see 9 Pat. 131 where it was held that this section could not be applied to persons proceeded against under Ch. VIII. •

SECTION 428.

Notes.—1. Scope of the section—when appellate Court ought not to take further evidence [*P.* 918, *n.* 2]—Further evidence should not be taken under this section for the purpose of filling a gap in the prosecution case when the necessary evidence was easily available to the prosecutor at the hearing and ought to have been then produced. (1935) *M. W. N.* 183 = 68 *M. L. J.* 336 = 41 *M. L. W.* 434 = *A. I. R.* 1935 *M.* 325 = 1935 *M. Cr. G.* 27. The section merely enables an appellate Court, if it thinks necessary, to call for additional evidence which will explain or clear up or perhaps supplement within limitations the evidence for the prosecution in support of a charge which has resulted in a conviction and which conviction is the subject of an appeal. It does not enable the appellate Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence. 54 *M.* 63.

2. Reasons for taking additional evidence must be given [*P.* 919, *n.* 6]—The appellate Court ought to record its reasons when it thinks necessary to take further evidence, but omission to do so does not invalidate the proceedings unless the omission has occasioned a failure of justice. 53 *M.* 688.

3. Court asked to record evidence, not entitled to find [*P.* 920, *n.* 11]—This section does not allow the trial Court to re-decide the case when additional evidence is directed to be taken. Where the District Magistrate directed the trial Court to take certain additional evidence and "complete the inquiry" it was held that the order in so far as it appeared to give the trial Court liberty to hear other evidence to "complete the inquiry" was improper. *A. I. R.* 1934 *Lah.* 318 = 35 *Cr. L. J.* 1166 = 150 *I. C.* 973 = 1934 *Cr. C.* 548.

SECTION 429.

Note.—What is meant by "case" when the Judges agree as to some accused and disagree as to others? [*P.* 920, *n.* 3]—The case laid before a third Judge under this section is the complete case in so far as the two Judges who first heard the appeal have differed as regards particular appellants but not the case of the other appellants as to whom they did not differ. *A. I. R.* 1931 *Lah.* 513 = 132 *I. C.* 381 = 32 *Cr. L. J.* 868 = 1931 *Cr. C.* 737 following 38 *C.* 202.

SECTION 430.

Note.—Principle applies also to judgments in revision.—Even though this section does not apply to judgments in revision applications, the principle of finality of judgments there laid down must apply to judgments in revision applications also. 36 *Bom. L. R.* 954 = *A. I. R.* 1934 *B.* 471 = 153 *I. C.* 525 = 1934 *Cr. C.* 1343.

CHAPTER XXXII.

OF REFERENCE AND REVISION.

SECTION 432.

Note.—Reference to High Court must be on question of law arising for decision [*P.* 922, *n.* 2]—The power of reference is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him. He ought not to refer questions of law unless they are matters upon which he has a duty to make up his mind. *A. I. R.* 1929 *C.* 756 = 50 *C. L. J.* 408 = 34 *C. W. N.* 13 = 1929 *Cr. C.* 468 (*F. B.*)

SECTION 435.

I.—NATURE AND SCOPE OF REVISIONAL JURISDICTION.

Notes.—1. What is meant by "correctness, legality or propriety" of any finding, etc.?—Legality and propriety would both include questions of law as to whether the finding, sentence or order was legal or proper having regard to the evidence. "Correctness" does not mean that the revisional Court may inquire whether the finding was acceptable to it on a balance of the evidence. The correctness of the finding, etc., also implies a legal defence such as the finding being based on entire want of evidence, etc. If there is evidence of whatsoever character on which a finding of fact may be based, the revisional Court cannot interfere with that finding. 1929 *A. L. J.* 775 = *A. I. R.* 1929 *A.* 587 = *L. R.* 10 *A. (Cr.)* 105 = 30 *Cr. L. J.* 756 = 117 *I. C.* 346 = 12 *A. I. Cr. R.* 107 = 1929 *Cr. C.* 476.

III.—CONCURRENT JURISDICTION OF SESSIONS JUDGES AND DISTRICT MAGISTRATES UNDER THIS CHAPTER—SUB-SEC. (4).

2. “Application” means application by a party to the proceeding.—The application referred to is an application by a party to the proceeding, *e.g.*, the accused, the Crown or the complainant, and not a stranger. An application by a stranger is merely by way of supplying information and bringing the fact to the knowledge of the Court and nothing more. 56 A. 158 (F. B.) Where either the Sessions Judge or District Magistrate has had an application in revision in the same matter before them, moved by either party, the other local District Court would have no jurisdiction to hear a further application in the same matter. 52 A. 257.

3. What is meant by “application has been made.”—The word “made” in sub-section (4) means not only “made” but “entertained and decided.” A petition was presented to the District Magistrate who made an order on it that it would be convenient if that application was presented to the Sessions Judge, as the records were in the Sessions Court. Another petition was therefore presented to the Sessions Court. But the Sessions Judge held that inasmuch as the application had been previously ‘made’ to the District Magistrate he was powerless to entertain another application under s. 435 (4). It was held in revision that “making” an application does not merely mean presenting a petition to the Magistrate or Sessions Judge, but it must mean so nothing more, *i.e.*, that the application must be heard and determined. 54 M. 842.

IV.—OVER WHAT COURTS AND PROCEEDINGS REVISIONAL JURISDICTION MAY BE EXERCISED.

4. No revisional jurisdiction over proceedings of Courts other than ‘criminal’ [P. 927, n. 11]—An order passed by a revenue Court under s. 478 cannot be revised by the District Magistrate even though for the purposes of s. 478 the presiding officer of the revenue Court was exercising the powers of a Magistrate. 5 Luck. 435. A District Magistrate exercising jurisdiction under the District Board Election rules as an authority to whom the returning officer is subordinate is not an “inferior Criminal Court” to whom the provisions of this section could apply. 1930 A. L. J. 216 = A. I. R. 1929 A. 931 = L. R. 11 A. (Cr.) 27 = 30 Cr. L. J. 1159 = 120 I. C. 128 = 1929 Cr. G. 659 = 13 A. I. Cr. R. 137. Orders in appeals relating to taxation passed by the District Magistrate under s. 160 of the U. P. Municipalities Act is final under s. 164 of the said Act. The Magistrate not acting as an inferior Criminal Court in passing the order, the same is not revisable by the High Court. 1933 A. L. J. 469 = A. I. R. 1933 A. 281 = L. R. 14 A. (Cr.) 59 = 34 Cr. L. J. 1105 = 145 I. C. 989 = 19 A. I. Cr. R. 173.

5. Courts and proceedings which have been held to be within the revisional jurisdiction [P. 928, n. 14]—*Proceedings under the Indian Railways Act* [N. 14 (v)]—The High Court has the power to revise any order passed by a Magistrate under s. 113 (4) of the Indian Railways Act. 34 Bom. L. R. 1666 = A. I. R. 1933 B. 59 = 34 Cr. L. J. 239 = 141 I. C. 794 = 1933 Cr. G. 123.

6. Powers of revision limited to proceedings of “inferior Courts” [P. 928, n. 15]—A District Magistrate is inferior as a Court, to the Sessions Judge. It is no business of a District Magistrate on the judicial side to criticise the propriety of the view taken by the superior Court, namely, the Sessions Court. It is his imperative duty to abide by the conclusion of that Court, loyally and faithfully. If, however, he considers that there is room for consideration, he may on the administrative side approach the Local Government or the Government Advocate to move the High Court by means of a revision, to consider the propriety of a sentence. The District Magistrate cannot be allowed to sit in judgment over the Sessions Judge and criticise the views of the Sessions Judge and bring his own views to the notice of the High Court. A. I. R. 1932 A. 124 = 1932 Cr. G. 149 = 1932 A. L. J. 67 = L. R. 13 A. (Cr.) 5 = 17 A. I. Cr. R. 56 = 137 I. C. 525 = 33 Cr. L. J. 474 ; 9 Rang. 352.

V.—POWERS AND DUTIES OF INFERIOR REVISIONAL COURTS.

7. Sessions Judge can take action on the application of third parties.—The powers of the Sessions Judge under this section is not limited to cases in which he happens to have personal knowledge leading him to suspect an irregularity nor is his action under this section limited to cases in which the persons directly interested as complainants or accused move him to call for records. If the Sessions Judge has any reasonable cause of suspicion that an irregularity has been committed he should call for the records irrespective of the source of his information. 12 Lah. 471 ; A. I. R. 1931 Lah. 145 = 32 P. L. R. 71 = 1931 Cr. G. 257 = 131 I. C. 353 = 32 Cr. L. J. 700.

8. No power to order retrial.—A District Magistrate has no power to order the retrial of a case. He can order a further inquiry under s. 436, but it is reserved to the High Court under s. 439, to use any of the powers conferred on a Court of Appeal which would include the right of ordering a retrial. 52 A. 257.

SECTION 436.

Notes.—1. Terms explained [*P. 933, n. 1*].—“*Further inquiry*”—“Further inquiry” under this section is not confined to a further inquiry under s. 202, but includes an inquiry prior to commitment. *A. I. R. 1931 Pat. 50 = 12 P. L. T. 729 = 1931 Gr. C. 146 = 130 I. C. 529 = 32 Cr. L. J. 548 = 16 A. I. Cr. R. 14.*

III.—IN WHAT CASES FURTHER INQUIRY MAY BE MADE.

2. Section applies to the stage preliminary to trial.—S. 436 has no application to trials but relates to proceedings antecedent and preliminary to trial, the object of which is to ascertain whether or not a trial shall take place. Trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged. *9 Rang. 239 (F. B.)*

3. Further inquiry can be ordered only when complaint is dismissed or accused discharged [*P. 936, n. 16*].—Where the police put in a referred charge-sheet and the Magistrate agreed with the police and directed the case to be treated as one of a civil nature, there was no complaint before the Magistrate which had been dismissed under s. 203 or s. 204 (3) and hence no order for further inquiry can be made under this section. (1932) *M. W. N. 548 = 36 M. L. W. 788 = 63 M. L. J. 679 = A. I. R. 1932 M. 673 = 5 M. Cr. C. 220 = 139 I. C. 500 = 33 Cr. L. J. 785 = 1932 Cr. C. 831.* Where a Magistrate had no jurisdiction to entertain a complaint by reason of the absence of a complaint of Court under s. 195, he has no jurisdiction to discharge the accused under s. 209 (2). The mere mention of s. 209 (2) in the Magistrate's order does not give the Sessions Judge jurisdiction to deal with it under s. 436. (1933) *M. W. N. 217 = 37 M. L. W. 547 = A. I. R. 1933 M. 413 = 1933 Cr. C. 566 = 1933 M. Cr. C. 200 = 144 I. C. 519 = 34 Cr. L. J. 800.* A discharge after a charge has been framed, amounts to an order of acquittal and further inquiry cannot be ordered in such a case. *A. I. R. 1934 Oudh 327 = 11 O. W. N. 818 = 1934 O. L. R. 649 = 35 Cr. L. J. 1151 = 150 I. C. 852 = 1934 Cr. C. 830.* The power conferred under this section to order further inquiry in the case of persons discharged extends also to the case of a person discharged under s. 494. *A. I. R. 1933 Nag. 78 = 29 N. L. R. 201 = 34 Cr. L. J. 519 = 143 I. C. 77 = 1933 Cr. C. 315 ; A. I. R. 1929 Lah. 315 = 30 P. L. R. 58 = 30 Cr. L. J. 233 = 114 I. C. 50 = 12 A. I. Cr. R. 113.*

4. Further inquiry in cases under Chapter VIII [*P. 937, n. 21*].—*Security for keeping the peace* [*N. 21 (a)*].—Further inquiry can be ordered under s. 436 only in respect of a complaint which has been dismissed under s. 203 or s. 204 (3) or into the case of any person accused of an offence who has been discharged. An application under s. 107 is not a complaint because it does not allege that any person has committed an offence. The person against whom the application is made is not ‘accused’ of any offence. The Sessions Judge could only make a report to the High Court in such cases under s. 438. *53 A. 148 ; A. I. R. 1931 Lah. 185 = 31 P. L. R. 350 = 127 I. C. 716 = 32 Cr. L. J. 21 = 15 A. I. Cr. R. 214 = 1931 Cr. C. 305.*

5. Further inquiry when proceedings stopped under s. 249 [*P. 938, n. 25*].—An order under s. 249 is neither one of dismissal of a complaint under ss. 203 or 204 (3) nor is it an order of discharge, and therefore this section has no application to such an order. *A. I. R. 1934 A. 17 = 1934 A. L. J. 360 = 147 I. C. 1028 = 1934 Cr. C. 45 = 1934 A. L. R. 341 = 35 Cr. L. J. 564.*

IV.—NOTICE TO ACCUSED.

6. Notice necessary before making order for further inquiry [*P. 938, n. 27*].—The proviso to the section makes it obligatory on a Court not to pass an order under the section unless the person discharged has had an opportunity of showing cause against the order. *A. I. R. 1933 Lah. 1018 (2) = 1933 Cr. C. 1555 = 35 P. L. R. 149 ; A. I. R. 1933 Sind 299 = 34 Cr. L. J. 1157 = 146 I. C. 35 = 1933 Cr. C. 1036.* The proviso was introduced in 1923 and cases decided before 1923 can have no bearing on the question. A disregard of the proviso is an illegality, and in any case such irregularity as seriously prejudices an accused person who is ordered to be proceeded against. *56 A. 285.* But if the failure to give notice to the accused has not resulted in a miscarriage of justice the trial is not vitiated. S. 436, is not mandatory. *A. I. R. 1934 Rang. 181 = 35 Cr. L. J. 1408 = 151 I. C. 722 = 1934 Cr. C. 816.* If the accused had not appeared before the Magistrate who dismissed the complaint under s. 203 he has no right to appear before the Sessions Judge when he orders further inquiry. *A. I. R. 1929 Pat. 230 = 30 Cr. L. J. 1069 = 119 I. C. 559.*

Y.—WHEN FURTHER INQUIRY MAY BE DIRECTED AND WHEN NOT.

7. Further inquiry may be ordered only where the discharge is illegal or perverse or evidence is obviously incomplete [*P. 940, n. 31*].—It is well settled that further inquiry should be undertaken only in exceptional cases and for good reasons shown. Unless the view taken by the Magistrate is palpably unreasonable or perverse the Sessions Judge or District Magistrate should not order further inquiry on the same materials simply because he was inclined to take a different view of the evidence, or merely because the revisional Court thinks that in the interests of justice it is necessary to do so. It is not for the accused to convince the Court of revision why further inquiry should not be ordered against him but it is for the prosecution to prove that the order of discharge was perverse or foolish or based upon a record of evidence which was obviously incomplete. *A. I. R. 1933 Lah. 561 = 34 P. L. R. 719 = 34 Cr. L. J. 735 = 144 I. C. 331 = 1933 Cr. C. 819; A. I. R. 1933 Lah. 166 = 34 P. L. R. 148 = 34 Cr. L. J. 190 = 141 I. C. 263 = 1933 Cr. C. 311.* An order of discharge made by the Magistrate after hearing all the evidence for the prosecution ought not to be set aside unless it can be said that the order was perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence. *35 Bom. L. R. 1181 = A. I. R. 1934 B. 48 = 35 Cr. L. J. 644 = 148 I. C. 271 = 1934 Cr. C. 245; 57 B. 430; 52 A. 257; A. I. R. 1934 Oudh 327 = 11 O. W. N. 818 = 1934 O. L. R. 649 = 35 Cr. L. J. 1151 = 150 I. C. 852 = 1934 Cr. C. 880; A. I. R. 1934 A. 944 = 4 A. W. R. 37 = L. R. 15 A. (Cr.) 140 = 1934 A. L. R. 1066 = 152 I. C. 884 = 1934 Cr. C. 1256 = 21 A. I. Cr. R. 238; A. I. R. 1930 Nag. 108 = 31 Cr. L. J. 417 = 122 I. C. 434 = 1930 Cr. C. 316 = 14 A. I. Cr. R. 196.*

8. When further inquiry may be ordered [*P. 940, n. 33*].—*Further inquiry can in case of discharge be directed upon same material [N. 33 (v)]*.—In an appropriate case the Court has the power to set aside an order of discharge passed by the Magistrate even though no additional evidence is sought to be produced. *A. I. R. 1933 Lah. 561 = 144 I. C. 331 = 1933 Cr. C. 819 = 34 P. L. R. 719 = 34 Cr. L. J. 735; A. I. R. 1934 A. 944 = 4 A. W. R. 37 = L. R. 15 A. (Cr.) 140 = 1934 A. L. R. 1066 = 152 I. C. 884 = 1934 Cr. C. 1256 = 21 A. I. Cr. R. 238.*

9. When further inquiry should not be ordered [*P. 942, n. 35*].—*When person against whom application is made under s. 107, is discharged*.—The question whether it is necessary to take security in the interest of keeping the peace is essentially a question which primarily concerns the District Magistrate and the local police and it is not the sort of case where the Sessions Judge or the High Court should interfere and order further inquiry. *53 A. 143.*

When it is likely that Courts may take different views of the evidence [N. 35 (iii)].—The mere fact that the District Magistrate was inclined to take a different view of the evidence from that of the trying Magistrate cannot be regarded as a sufficient ground for ordering further inquiry. *A. I. R. 1932 Oudh 114 = 9 O. W. N. 134 = 1932 Cr. C. 187 = 33 Cr. L. J. 383 = 137 I. C. 71 = 18 A. I. Cr. R. 62; A. I. R. 1929 A. 588 = L. R. 10 A. (Cr.) 102 = 30 Cr. L. J. 755 = 117 I. C. 345 = 1929 Cr. C. 176 = 12 A. I. Cr. R. 94.*

10. Reasons for ordering further inquiry should be stated [*P. 943, n. 36*].—In a case where the Sessions Judge reverses the order of the Magistrate discharging an accused person, the Sessions Judge ought to give reasons for directing further inquiry. It is highly desirable that the order should make it clear that the Magistrate's order of discharge is based on grounds which cannot be sustained. *56 A. 285.*

VI.—DUTIES AND POWERS OF COURTS DIRECTING FURTHER INQUIRY.

11. What Court directing further inquiry cannot do [*P. 943, n. 38*].—*No direction to be given as to the manner of conducting further inquiry*.—No directions or instructions can lawfully be given to the Magistrate as to the manner in which he should conduct the inquiry. The Magistrate must exercise the power he possesses in that behalf according to law. He should determine whether or not process shall issue or a trial take place and his discretion in the matter is not to be fettered by instructions or directions from any quarter. He will be at liberty to conduct the inquiry in his own way provided he conforms to the provisions of the Code. *9 Rang. 239 (F. B.)*

No direction to be given to frame a charge and try accused [N. 38 (v)].—The section only empowers the Sessions Court to direct a further inquiry. An inquiry is not a trial and the definition of the word "inquiry" in s. 4 (k) bears out this interpretation. *13 Lah. 599.*

No direction to be given that further inquiry should be held by a particular Magistrate—See A. I. R. 1930 M. 983 = (1930) M. W. N. 911 = 32 M. L. W. 782 = 3 M. Gr. C. 366 = 32 Cr. L. J. 226 = 129 I. C. 71 = 1930 Cr. C. 1199.

No power to quash the charge—Where the Magistrate framed a charge against the accused under s. 354, I. P. C. but the Sessions Judge in revision held that only a case under s. 366/511, I. P. C. had been made out and accordingly forwarded the proceedings to the District Magistrate asking him to direct further inquiry, held that in withdrawing the case from the trying Magistrate and forwarding it to the District Magistrate the proceedings were tantamount to quashing the charge which the Sessions Judge had no power to do. The correct procedure was to refer the case to the High Court. A. I. R. 1933 Rang. 214 = 34 Cr. L. J. 1083 = 145 I. C. 720 = 1933 Cr. C. 896.

Power to order retrial [P. 943, n. 38 (i)]—Though it may not perhaps be illegal to order a retrial, it is obvious that that is not what s. 436 contemplates in the ordinary way and there must be a strong case indeed to justify an order for retrial *de novo*. 35 Bom. L. R. 1181 = A. I. R. 1934 B. 48 = 35 Cr. L. J. 644 = 148 I. C. 271 = 1934 Cr. C. 245.

12. Magistrate holding further inquiry can frame charge and try accused [P. 943, n. 38 (v)]—When a further inquiry is made whether by the District Magistrate or by a Magistrate subordinate to him, the Magistrate who holds that inquiry can, if he finds sufficient grounds for so doing, not only frame a charge but also proceed to hold a trial. 66 M. L. J. 318 = (1934) M. W. N. 102 = 39 M. L. W. 344 = A. I. R. 1934 M. 209 = 1934 M. Cr. C. 99 = 35 Cr. L. J. 691 = 143 I. C. 573 = 1934 Cr. C. 405.

SECTION 437.

Notes.—1. Should the accused have been discharged of an offence exclusively triable by a Court of Session? [P. 945, n. 5]—The section merely requires that an accused person should have been improperly discharged by the inferior Court. These words are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Session. A. I. R. 1935 A. 366 = 1935 A. L. J. 653. *Contra*.—The section relates only to cases triable exclusively by the Court of Session. A. I. R. 1930 M. 103 = (1929) M. W. N. 709 = 2 M. Cr. C. 291 = 31 Cr. L. J. 459 = 122 I. C. 788 = 1930 Cr. C. 17 = 14 A. I. Cr. R. 294. An offence under s. 304-A, I. P. C. is one triable not only by the Court of Session but also by a Magistrate of the first class. Hence an order under this section cannot be made in respect of that offence. A. I. R. 1934 Oudh 327 = 11 O. W. N. 818 = 1934 O. L. R. 649 = 35 Cr. L. J. 1151 = 150 I. C. 852 = 1934 Cr. C. 880.

2. What amounts to 'discharge' [P. 945, n. 8]—When there was before the Magistrate a complaint or report to the effect that the major offence has been committed, although there was very little evidence to show that the prosecution pressed for a charge in respect of that offence and the Magistrate did not pass any orders in regard to that part of the case, it must be held that an order of discharge in respect of the major offence is implied and the Sessions Judge therefore has jurisdiction to direct committal in such a case. 56 A. 529. The word "discharged" means not only "absolutely discharged and set at liberty" but also "partially discharged" or in other words not charged with an offence exclusively triable by the Court of Session. 15 Lah. 138.

3. Points to be considered in directing commitment [P. 946, n. 9]—Under this section all that the Sessions Judge has to do is to come to the conclusion that the order of discharge was improper. He can set aside the order and commit the accused for trial (1) when he considers that the charge was not groundless and (2) when he considers that there are sufficient grounds for commitment both on facts and on legal grounds, or even when the proceedings before the inferior Court were not regular, and that is the meaning of the expression "improperly discharged." It cannot therefore be said that an order of discharge ought not to be set aside unless "the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence by the Court." Nor is there any warrant for the proposition laid down in 57 B. 430 in these words "the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence." 59 B. 125 (F. B.) *overruling* 57 B. 430; A. I. R. 1935 A. 366 = 1935 A. L. J. 653. The Sessions Judge should also remember that the power of revision should be used sparingly, that the Magistrate who discharged the accused had the advantage of seeing the witnesses personally and that the object of the Legislature in requiring an inquiry before a trial in a Court of Session is to prevent commitment in cases where there is no reasonable ground for conviction and to save people from the anxiety of undergoing prolonged and expensive trials and to save the time of the Sessions

Court from being wasted. 59 B. 125 (F. B.) The circumstances under which an order of discharge under s. 209 will be set aside are exactly similar to those in which an order would be set aside which had been passed under s. 253. A. I. R. 1934 Pesh. 52 = 35 Cr. L. J. 1282 = 151 I. C. 143 = 1934 Cr. C. 884.

4. **Order must be based on the record as it stands and not on evidence subsequently recorded** [P. 946, See n. 10 (iii)]—An order under this section has to be passed on an examination of the record of the case, as it stands at the time the Sessions Judge takes it up for consideration. An order directing committal cannot be made on evidence recorded under s. 219, which was a later addition by way of supplement to the record and by no means part of it. 65 M. L. J. 6 = 38 M. L. W. 668 = (1932) M. W. N. 1162 = A. I. R. 1933 M. 247 = 5 M. Cr. C. 373 = 142 I. C. 138 = 34 Cr. L. J. 278 = 1933 Cr. C. 374.

5. **Revision of order of commitment by High Court** [P. 947, n. 15]—Where the lower Court acting upon a discretion which the law confers, has committed an accused for trial by the Court of Sessions, and its proceedings are not on the face of them illegal or arbitrary or capricious, the High Court as a revisional Court would neither inquire into the reasons, nor interfere. A. I. R. 1934 Sind 27 = 35 Cr. L. J. 884 = 148 I. C. 1066 = 1934 Cr. C. 225 = 21 A. I. Cr. R. 241.

6. **Continuing jurisdiction** [P. 948, n. 17-A]—A previous order rejecting an application for setting aside the order discharging the accused is no bar to the Court making an order committing the accused under this section. Jurisdiction to make an order under this section is a continuing jurisdiction and is not barred merely because an application may have been previously refused upon different materials. A. I. R. 1930 C. 61 = 33 C. W. N. 974 = 31 Cr. L. J. 260 = 121 I. C. 401 = 1930 Cr. C. 13 = 13 A. I. Cr. R. 352.

SECTION 438.

Notes.—1. Limitation to powers of reference [P. 949, n. 3]—*Limited to proceedings of inferior Criminal Courts*—A District Magistrate is not empowered to make a reference to the High Court requesting that the sentence reduced by the Sessions Judge, may be enhanced. The powers conferred under this section on the District Magistrate are limited to proceedings before an inferior Court. 9 Rang. 352; 1932 A. L. J. 67 = 1932 Cr. C. 149 = A. I. R. 1932 A. 124 = L. R. 13 A. (Cr.) 5 = 17 A. I. Cr. R. 56 = 137 I. C. 525 = 33 Cr. L. J. 474. The Sessions Judge and District Magistrate have got concurrent jurisdiction to make a reference only regarding the proceedings of inferior Criminal Courts. A. I. R. 1934 Sind 154 = 36 Cr. L. J. 27 = 152 I. C. 339 = 1934 Cr. C. 1146. Although in another capacity it is one of the duties of the District Magistrate to report to Government whenever he thinks that action should be taken by Government regarding an order passed by the Sessions Judge, as a District Magistrate he has not the authority and cannot refer direct to the High Court the question of the propriety of an order passed by a Criminal Court superior to himself. A. I. R. 1933 Lah. 433 (2) = 34 Cr. L. J. 371 = 142 I. C. 622 = 1933 Cr. C. 674; A. I. R. 1933 Pat. 305 = 14 P. L. T. 364 = 1933 Cr. C. 826 = 145 I. C. 393 = 34 Cr. L. J. 947. Where the Sessions Judge has dismissed the appeal by the accused, the District Magistrate is not precluded from making a reference to the High Court for enhancement of sentence, for the Sessions Judge had no power when dealing with the appeal, to enhance the sentence. But it is not desirable that the High Court should entertain a letter of reference from the District Magistrate when the facts of the case had already been brought to the notice of the Sessions Judge in the appeal. 57 C. L. J. 211 = A. I. R. 1933 C. 791 = 35 Cr. L. J. 27 = 146 I. C. 354 = 1933 Cr. C. 1358.

2. **Section does not authorise Sessions Judge or District Magistrate to refer his own order.**—Subsec. (1) appears to contemplate action by the Sessions Judge or District Magistrate upon examination of the proceedings of a Subordinate Court. It does not apparently authorise the Sessions Judge or Magistrate to refer his own order with a recommendation that it be altered. 13 Pat. 150. But if there is a real mistake or illegality the reference may be treated as information under s. 439 from the lower Court that a mistake has been made and the matter can be set right in revision. A. I. R. 1934 Pat. 551 = 15 P. L. T. 475 = 36 Cr. L. J. 100 = 152 I. C. 291 = 1934 Cr. C. 1195. But see 15 Lah. 63 where it was held that although it was unusual for a Judge to make a reference regarding the legality of his own order, yet there is nothing in s. 438 to preclude him from doing so, the words "or otherwise" being wide enough to cover such a reference. See also A. I. R. 1930 A. 817 = 1930 A. L. J. 1076 = 129 I. C. 260.

3. **Cases of acquittal not to be reported under this section** [P. 949, n. 4]—In the case of an acquittal where the Local Government does not appeal or where the District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference under this section.

A. I. R. 1931 Lah. 533 = 1931 Cr. C. 773 = 134 I. C. 208 = 32 Cr. L. J. 1128 = 32 P. L. R. 789 ; (1934) M. W. N. 927 ; 1933) M. W. N. 878 (1). Where the reference is entirely on the merits, the High Court should refuse to interfere. **56 C. 924.** In exceptional cases, however, such a reference can be entertained. **A. I. R. 1934 A. 714 = 3 A. W. R. 564 = 1934 A. L. R. 836 = 35 Cr. L. J. 1289 = 131 I. C. 350 = 1934 Cr. C. 902.** A District Magistrate is however not precluded under s. 439 (5) from making a reference in the case of an acquittal merely because the Local Government has not appealed. The Local Government is not the same person as the District Magistrate. **53 A. 42.** Assuming that ordinarily the High Court will not interfere with an acquittal on a reference by a District Magistrate who has the means of communicating with the Local Government with a view to an appeal under s. 417, it does not follow that the position should be the same in respect of a reference by the Sessions Judge who has no such means, whose outlook on the matter cannot but be purely judicial and who must either act under s. 438 or not at all. **7 Pat. 579.**

4. When reference should not be made [P. 950, n. 6].—Referring Courts must always bear in mind the limits which the High Court has in practice set upon its own discretion, *viz.*, not to interfere with decisions on facts except for special reasons, and no reference should be made where the only objection is to the finding of the Court below upon the merits. **53 C. 1081 ; A. I. R. 1934 Oudh 280 = 11 O. W. N. 719 = 1934 O. L. R. 506 = 35 Cr. L. J. 951 = 1934 Cr. C. 776 = 149 I. C. 364 ; A. I. R. 1934 Oudh 278 = 11 O. W. N. 718 = 1934 O. L. R. 507 = 1934 Cr. C. 774 ; A. I. R. 1934 Oudh 276 = 11 O. W. N. 717 = 1934 O. L. R. 507 = 1934 Cr. C. 773.** A report ought not to be made to the High Court on matters of fact, or unless the examination of the proceedings in the inferior Court discloses a question of law which the Sessions Judge or District Magistrate thinks would more properly be determined by the High Court. Except in exceptional circumstances and in cases to which s. 437 applies, the Sessions Judge or the District Magistrate ought not to take the case out of the hands of the Magistrate whose responsible duty it is to determine whether process should issue against a person or whether he should be put upon his trial. **9 Rang. 239 (F. B.)**

5. Sessions Judge cannot entertain revision after making reference under this section.—After having passed an order of reference under this section the Sessions Judge becomes *functus officio* and has no power to revise or review his own order and by a separate order reject an application for revision. Such an order is *ultra vires* and illegal. **A. I. R. 1934 Oudh 85 = 11 O. W. N. 75 = 1934 O. L. R. 132 = 35 Cr. L. J. 417 = 147 I. C. 516 = 1934 Cr. C. 255.**

6. Sub-section (2). Power of Additional Sessions Judge.—An Additional Sessions Judge has no power to make a reference in respect of a case which has not been transferred to him. **A. I. R. 1934 Oudh 86 = 11 O. W. N. 66 = 1934 O. L. R. 110 = 1934 Cr. C. 256 = 147 I. C. 382 = 35 Cr. L. J. 396.** A Sessions Judge cannot make a general delegation of his powers to the Additional Sessions Judge of starting a revision case *suo motu*. **(1935) M. W. N. 459.**

SECTION 439.

I.—SCOPE OF REVISIONAL JURISDICTION OF HIGH COURT.

Notes.—1. Jurisdiction of the High Court under s. 107, Government of India Act.—Under s. 107, Government of India Act, 1915 each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction. It is competent for the Governor-General to override the provisions of ss. 435 and 439 of the Code by promulgating an Ordinance under s. 72, Government of India Act. It is also clear that under cl. 44, Letters Patent, he can override the powers of the High Court derived under the Letters Patent; but the powers conferred on the High Court by s. 107, Government of India Act which is an Act of the Imperial Parliament cannot be controlled by the Governor-General. The High Court has therefore power to revise the orders of inferior criminal Courts passed under Ordinances promulgated by the Governor-General, *e.g.*, The Emergency Powers Ordinance, 1932. **57 B. 93 (S. B.) ; A. I. R. 1933 B. 148 = 35 Bom. L. R. 185 = 1933 Cr. C. 460 = 143 I. C. 622 = 34 Cr. L. J. 771.**

II.—WHEN HIGH COURT WILL EXERCISE ITS POWERS OF REVISION.

2. Power of revision is discretionary and ought not to be fettered [P. 955, n. 9].—The Code confers the widest powers of revision upon the High Court and Judges should not seek to lay down rules which confine that discretion in a manner in which the Legislature has not seen fit to confine it. **58 B. 40.** The exercise of revisional powers by the High Court is entirely discretionary. In a revisional matter the High Court does

not take a technical view and interfere in every case where an order has been made irregularly or even improperly. 59 C. 275; A. I. R. 1931 Rang. 161 = 1931 Cr. C. 657 = 133 I. C. 489 = 32 Cr. L. J. 1068. The discretion of the High Court ought only to be exercised in order to prevent substantial injustice or where there is involved a point of law of general importance which may govern other cases. 56 B. 554; 13 Lah. 599. The powers of the High Court in criminal revision are not intended for the gratification of private malice, nor are they to be used to vindicate the position of a private prosecutor where a merely technical offence has been committed, however clearly that technical offence may have been proved. 9 Pat. 113. Parties cannot be allowed to raise in revision a point that was not taken at the trial. To allow parties in petty Magisterial cases to reserve their defence till they can bring it up to the High Court upon revision would be to turn topsy-turvy the judicial system of the Presidency. 55 M. 90.

3. High Court though competent to deal with evidence in revision will not as a rule do so except to prevent miscarriage of justice [P. 958, n. 16]—The High Court will not go into evidence unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. There must be something on the face of the judgment or record, which need not always be a ground of law, to show that the evidence ought to be examined to see whether there has been a miscarriage of justice. 58 C. 1081; A. I. R. 1933 Sind 359 = 146 I. C. 952 = 1933 Cr. C. 1335; A. I. R. 1933 Sind 139 = 34 Cr. L. J. 802 = 144 I. C. 427 = 1933 Cr. C. 337. Ordinarily the Court will not go into facts at all unless the conscience of the Court has been touched with regard to them. 13 Pat. 150. When evidence given in the lower Court was not challenged, and such evidence is sufficient proof to comply with the provisions of the law, the matter cannot be challenged in revision. A. I. R. 1931 A. 12 = 1931 Cr. C. 12 = 1930 A. L. J. 1535 = 129 I. C. 443 = 32 Cr. L. J. 311. It is not for a Court sitting in revision to decide which of two conflicting sets of evidence should be believed. It is enough that there was sufficient evidence on the record from which the trying Magistrate could reach the decision. A. I. R. 1932 Nag. 97 = 28 N. L. R. 106 = 1932 Cr. C. 519 = 139 I. C. 401 = 33 Cr. L. J. 835; 33 Cr. L. J. 811 = 139 I. C. 636 = A. I. R. 1932 Oudh 113 = 9 O. W. N. 116 = 1932 Cr. C. 186 = 18 A. I. Cr. R. 136; A. I. R. 1933 Oudh 117 = 10 O. W. N. 47 = 34 Cr. L. J. 649 = 143 I. C. 835 = 1933 Cr. C. 238; 10 Lah. 794; A. I. R. 1933 Oudh 430 = 10 O. W. N. 1037 = 35 Cr. L. J. 121 = 146 I. C. 638 = 1933 Cr. C. 1315. Findings of fact will not be interfered with unless it can be said that they were based on no evidence or are obviously incorrect. A. I. R. 1930 C. 645 = 34 C. W. N. 580 = 127 I. C. 553 = 31 Cr. L. J. 1225 = 1930 Cr. C. 1206 = 15 A. I. Cr. R. 221. Where the lower Court has based its inference on circumstances which really did not exist, it is obviously right for the High Court to interfere. A. I. R. 1934 Rang. 42 = 35 Cr. L. J. 849 = 148 I. C. 1035 = 1934 Cr. C. 265.

III.—PRELIMINARY CONDITIONS FOR EXERCISE OF REVISIONAL POWERS.

4. Generally no revision where appeal lies [P. 962, n. 22]—Where a remedy ultimately lies by way of appeal, it is unnecessary for the High Court to move in revision. 54 M. 595; 7 Luck. 501. Where a party aggrieved has a right of appeal which he has deliberately elected to leave unused the High Court will, as a rule, be slow to interfere in revision either on its own motion or at the instance of any unauthorised third person. A. I. R. 1932 Sind 211 = 1932 Cr. C. 902 = 26 S. L. R. 345 = 34 Cr. L. J. 67 = 140 I. C. 697. An accused person must wait till he is charged, before he defends himself and if he is convicted, his first remedy is in most cases by way of appeal. 54 M. 251. Where a charge was framed against the accused and he was convicted after having been called on to enter upon his defence, an order by the Sessions Judge setting aside the conviction and sentence, was in truth and in fact an order acquitting the accused even though the Sessions Judge used the word "discharged." An appeal lies from such an order and a revision application would not be entertained. 10 Rang. 315.

(a) *Orders under s. 144*—The jurisdiction conferred by s. 144 (4) upon a Magistrate to rescind or alter an order made under that section by himself or any Magistrate subordinate to him or by his predecessor in office is neither appellate nor revisional jurisdiction. It is a special jurisdiction conferred by a special provision of the Statute. Therefore a revision lies to the High Court even if the District Magistrate is not moved under s. 144 (4). A. I. R. 1932 M. 720 = (1932) M. W. N. 726 = 5 M. Cr. C. 269 = 36 M. L. W. 461 = 68 M. L. J. 594 = 139 I. C. 773 = 33 Cr. L. J. 826.

5. Usually High Court will not interfere where there exists Courts of concurrent revisional jurisdiction [P. 962, n. 23]—It is no doubt the general practice of the High Court not to entertain a revision

when the applicant could have gone to the District Magistrate or the Sessions Judge. But of course, even a settled practice does not oust the jurisdiction of the High Court. 54 A. 331. If special grounds are shown, the High Court will interfere. 8 O. W. N. 1027 = 1931 Cr. C. 1053 = A. I. R. 1931 Oudh 418 = 135 I. C. 701; A. I. R. 1932 Sind 28 = 25 S. L. R. 395 = 1932 Cr. C. 114 = 33 Cr. L. J. 298 = 136 I. C. 513. In 55 A. 261 the Allahabad High Court refused to entertain a revision on the ground that there had grown a practice in that Court that an application in revision to the lower Court was an essential step in the procedure, and failure on the part of the applicant in this respect operated as a bar to the entertainment of the application. See also 1929 A. L. J. 514 = A. I. R. 1929 A. 272 = L. R. 10 A. (Cr.) 97 = 30 Cr. L. J. 1079 = 119 I. C. 444 = 12 A. I. Cr. R. 57. In 56 A. 158 (F. B.) the rule was thus laid down that in observance of the well-established practice of the Court neither an application in revision by an accused person nor an application by a third party should be entertained unless there are special reasons why the applicant should not have gone to the District Magistrate or the Sessions Judge in the first instance. But if a Judge on very special grounds decides to intervene and once the application is admitted such an objection should not be entertained.

6. **Delay in applying to High Court in revision** [P. 962, n. 24]—The admission or non-admission of an application for revision is a matter entirely within the discretion of the revisional Court. If an application for revision is made after unreasonable delay, that alone can be a sufficient ground to reject the application. In determining whether there was unreasonable delay, the period prescribed for limitation in the case of appeals may be taken as the standard of reasonable time. 7 Luck. 699. The rule of practice in the Patna High Court is ordinarily not to interfere in revision on an application presented more than two months after the date of the order complained of. A. I. R. 1933 Pat. 601 (2) = 146 I. C. 551 = 35 Cr. L. J. 91 = 1933 Cr. C. 1363. So far as the Lahore High Court is concerned, there is no rule of practice that criminal revisions, which are filed after the expiry of the period say of sixty or ninety days, must be rejected simply on the ground of delay and laches. The Judge may take into consideration the factor of delay but that factor cannot be treated as the sole determining element and the case will have to be decided on its general merits. A. I. R. 1934 Lah. 264 = 35 Cr. L. J. 1447 = 151 I. C. 943 = 1934 Cr. C. 502.

IV.—HOW POWERS OF HIGH COURT INVOKED—PRACTICE AND PROCEDURE.

7. **Manner in which revisional power is invoked** is immaterial [P. 963, n. 26]—The High Court can entertain an application in revision where no right of appeal has been exercised, when the application is made by a third party; but third parties ought not to apply in revision unless there is a very strong case. 55 B. 353. The inferior revisional Courts have similarly power to call for records under s. 435 on the application of third parties if there is reasonable ground for suspicion that an irregularity has occurred. 12 Lah. 471. The fact that the accused has not exercised his right of appeal does not prevent the exercise of its revisional powers by the High Court. Under sub-section (5) of this section the prohibition is limited only to those cases in which the Court is asked to interfere *at the instance* of the party who could have appealed, but has not done so. It leaves untouched the Court's powers under sub-section (1). Where the Court is satisfied that a serious miscarriage of justice has taken place, it undoubtedly possesses unfettered powers to pass such orders as it in its discretion thinks fit even though the aggrieved person could have taken the matter to the appellate Court but has failed to do so. 32 P. L. R. 71 = A. I. R. 1931 Lah. 145 = 32 Cr. L. J. 700 = 131 I. C. 353 = 1931 Cr. C. 257; A. I. R. 1931 Lah. 153 = 32 Cr. L. J. 708 = 131 I. C. 360 = 1931 Cr. C. 265 = 15 A. I. Cr. R. 477. But if the application in revision is made by a third party at the instigation of the accused, the prohibition in sub-section (5) will operate. The object of sub-section (5) is not to punish the convicted person but to induce him to avail himself of the larger remedy. 56 A. 158 (F. B.) The discretion however, should be exercised sparingly. A. I. R. 1932 Lah. 559 = 33 P. L. R. 911 = 33 Cr. L. J. 831 = 139 I. C. 696 = 1932 Cr. C. 713. Revision was entertained at the instance of the Bar Association in 55 A. 857, 6 Luck. 266, A. I. R. 1932 Lah. 613 = 34 P. L. R. 32 = 34 Cr. L. J. 87 = 141 I. C. 33 = 1932 Cr. C. 919 and other cases. It is not a question of any right of the accused nor the *locus standi* of the High Court Bar Association, but the High Court itself has power in any case to which its attention has been drawn in any manner whatsoever to interfere in the interests of law and justice. 33 P. L. R. 384 = A. I. R. 1932 Lah. 364 = 33 Cr. L. J. 339 = 136 I. C. 717 = 1932 Cr. C. 482. Third party applications are quite legitimate. 56 A. 158 (F. B.) At the same time, if the convicted persons are men of position and educated, it is not a fit case for entertaining an application for reduction of sentence at the instance of a third party, the convicted persons not having seen fit to appeal. A. I. R. 1933 C. 361 = 34 Cr. L. J. 814 = 144 I. C. 691 = 1933 Cr. C. 497. Where after filing the appeal the accused expressed his desire not to prosecute the appeal, the appeal must be considered as withdrawn, but it is the duty of the High Court when a matter has been brought to its notice,

which it considers should be corrected, to deal with it as though it were a revision. **A. I. R. 1931 Lah. 97 = 31 P. L. R. 990 = 32 Cr. L. J. 732 = 131 I. C. 375 = 1931 Cr. C. 161.** Where a person moved the Court as a resident tax-payer and as such interested in the prisoner, but the prisoner himself preferred to abide by the decision already given, the Court would not interfere where the prisoner was of age, educated and sane, unless the Court is satisfied that there has been a miscarriage of justice. Even where there has been a miscarriage of justice the Court, in the interests of the prisoner himself, where he prefers to abide by the decision already given, must be careful to avoid taking any action which may place him in other and perhaps greater jeopardy, while seeking to remove the stigma of illegality from the administration of the law. On the other hand the Court cannot allow any such miscarriage to be used to gratify a desire for self-advertisement or pretended martyrdom at the expense of the Court's reputation for impartiality and justice. **58 C. 1303.** The mere fact that the accused in the Magistrate's Court refused to take part in the proceedings or stated that he had nothing to say in defence is not a valid reason for refusing to exercise revisional powers if their exercise is called for on the merits of the case. **56 A. 158 (F. B.); 55 A. 857.** Where the accused was convicted of kidnapping under s. 366, I. P. C. and the Sessions Judge set aside the conviction and directed committal to the Sessions, the father of the girl was a proper person to move the High Court in revision. **54 A. 756.**

8. Notice must go to accused [*P. 964, n. 30*].—The direction in sub-section (2) is mandatory. **A. I. R. 1933 Lah. 433 (2) = 142 I. C. 622 = 34 Cr. L. J. 371 = 1933 Cr. C. 674.**

9. Procedure on difference of opinion.—S. 429 governs the case of difference of opinion between Judges composing the Court of Revision. Clause 36 of the Letters Patent has no application to such a case. (1932) **M. W. N. 873.**

V.—POWERS OF HIGH COURT TO DEAL WITH PROCEEDINGS NOT EXPRESSLY CRIMINAL.

10. Orders under the Extradition Act [*P. 965, n. 41*].—When a Magistrate orders execution of a warrant issued by the Political Agent, under s. 7, Extradition Act, or releases the accused on bail he is not acting in his judicial capacity and he is not a Court of inferior criminal jurisdiction. His orders therefore cannot be revised under this section. But the High Court has power under s. 491 to interfere in case of an arrest under illegal warrant. **56 A. 409.** In **53 B. 149** it was held that the intention in referring the Extradition Warrant to the District Magistrate is that the Magistrate should judicially consider the matter and decide whether the warrant can be executed according to law. If the warrant was illegal or without jurisdiction, the Magistrate would not be justified in issuing an order for its execution and any order judicially made in this matter was subject to the revisional powers of the High Court.

VI.—GENERAL POWERS OF HIGH COURT IN REVISION.

11. Interference in pending cases—May interfere with interlocutory proceeding [*P. 966, n. 42 (ii)*].—The High Court will interfere to quash proceedings of an interlocutory nature where it is clear that interference is necessary where no offence has obviously been committed. **57 B. 690; 5 Luck. 297.** Ordinarily if the Magistrate has ordered an accused to be tried, the trial must proceed. But when the High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will be abdication of its function if it did not interfere to stop patent injustice calling for a prompt redress. **A. I. R. 1932 Pat. 72 = 12 P. L. T. 937 = 1932 Cr. C. 136 = 136 I. C. 842 = 33 Cr. L. J. 349; 9 Luck. 61; A. I. R. 1933 Rang. 297 = 35 Cr. L. J. 52 = 146 I. C. 402 = 1933 Cr. C. 1128; A. I. R. 1933 Sind 196 = 34 Cr. L. J. 884 = 1933 Cr. C. 711 = 27 S. L. R. 214; A. I. R. 1934 Nag. 138 = 1934 Cr. C. 569.** If on the face of the complaint the offence alleged against an accused person appears not to have been committed within the jurisdiction of the Court in which the complaint is filed, then it would certainly be the duty of the High Court to interfere and save waste of public time and needless expense. **A. I. R. 1933 Sind 88 = 34 Cr. L. J. 364 = 142 I. C. 590 = 1933 Cr. C. 216.**

It is only in exceptional instances that the High Court will interfere in a pending case [*P. 967, n. 42 (iii)*].—The High Court must be very reluctant to interfere in revision in a case which has not been completed. **A. I. R. 1933 A. 211 = 1933 A. L. J. 30 = L. R. 14 A. Cr. 39 = 34 Cr. L. J. 956 = 145 I. C. 400 = 1933 Cr. C. 367 = 19 A. I. Cr. R. 161; A. I. R. 1933 Sind 169 = 34 Cr. L. J. 1049 = 145 I. C. 617 = 1933 Cr. C. 533; A. I. R. 1934 Sind 183 (1) = 153 I. C. 320 = 1934 Cr. C. 1378.** The power to quash criminal proceedings

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at the outset is a power which should be used sparingly and with circumspection. To justify the use of such power there must appear on the face of the proceedings some infraction or evasion of law calling for prompt redress. *A. I. R. 1935 Sind 81*; *A. I. R. 1930 Lah. 881 = 31 P. L. R. 809 = 32 Cr. L. J. 145 = 128 I. C. 542 = 1930 Cr. C. 977*. The High Court will not interfere in revision to decide the admissibility of certain evidence in committal proceedings. Since it will rest upon the trial Court independently to decide upon its admissibility. The mere fact that the revision petition was admitted is no bar to the Court refusing to entertain the revision application. *58 M. 430*.

12. Power to suspend order under s. 144.—Powers of revision are exercised under s. 435 (1) or under s. 439. S. 435 (1) only applies to suspension of execution of imprisonment or fine. None of the sections mentioned in s. 439 will apply to the suspension of an order under s. 144. But since there are orders execution of which can be stayed by the High Court which do not fall under s. 439 they are either dealt with under s. 561-A in the exercise of its inherent powers or under s. 107, Government of India Act. There is no section apart from s. 561-A which enables the High Court to stay proceedings. *56 M. 149*.

13. High Court may deal with conviction of accused not applying, while dealing with application for revision by co-accused [*P. 969, n. 47*].—When acquitting the principal accused on his application in revision it is open to the High Court to make an order in its discretion, acquitting his co-accused who have not preferred such an application. *58 C. 902*. Similarly, on the appeal of one accused the High Court may deal with the sentences passed on the other co-accused who have not appealed. *A. I. R. 1934 Lah. 346 = 36 P. L. R. 121 = 35 Cr. L. J. 1046 = 150 I. C. 21 = 1934 Cr. C. 565*; *A. I. R. 1934 Sind 72 = 28 S. L. R. 140 = 35 Cr. L. J. 1254 = 151 I. C. 175 = 1984 Cr. C. 625*.

14. Power to alter finding [*P. 969, n. 49*].—When the accused were charged under s. 325, I. P. C. and convicted under a minor section, namely, s. 323, the Magistrate must be held to have acquitted them of the charge under s. 325 and the High Court in revision cannot alter the conviction into one under s. 325 in consequence of the ruling in *50 A. 722 (P. C.)*. *A. I. R. 1931 Rang. 321 = 1931 Cr. C. 1007*; *A. I. R. 1932 Oudh 25 = 8 O. W. N. 1299 = 1932 Cr. C. 57 = 135 I. C. 382 = 33 Cr. L. J. 162 = 17 A. I. Cr. R. 298*. When the accused was charged under s. 302, I. P. C. but was convicted under s. 326, I. P. C. the High Court cannot find the accused guilty under s. 302. *A. I. R. 1929 Lah. 615 = 30 Cr. L. J. 552 = 115 I. C. 854 = 1929 Cr. C. 182 = 12 A. I. Cr. R. 410*. It would not be fair in revision to alter a conviction under the Arms Act to one under the Explosives Act unless a conviction under the latter Act were obviously correct and unless it were certain that the accused had not been prejudiced by being charged under the Arms Act. *53 A. 226*.

15. Stay of proceedings in Criminal Court pending result of civil litigation [*P. 970, n. 52*].—The discretion to be exercised by the High Court in ordering stay of criminal proceedings cannot be crystallized into a hard and fast rule, and must largely depend on the circumstances of each case. One point of importance obviously is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards, an intention to prejudice the civil litigation may often be suspected especially when there has been a long delay. *A. I. R. 1933 B. 307 = 35 Bom. L. R. 384 = 1933 Cr. C. 894 = 145 I. C. 161 = 34 Cr. L. J. 900*.

VII.—WHAT PROCEEDINGS UNDER THE CODE HIGH COURT MAY REVISE.

16. Orders under s. 195 [*P. 971, n. 56*].—Sub-section (6) of s. 195, as it stood before it was amended, provided that any sanction given or refused under s. 195 might be revoked or granted by an authority to which the authority giving or refusing it, was subordinate. Under the present section there can only be a complaint either by a public servant with reference to sub-sec. (1) (a) or by a Court under sub-sections (1) (b) and (c). Now sub-section (6) of s. 195, has been omitted and a right of appeal is definitely given under s. 476-B in the case of a complaint made by a Court. In the case of a complaint by a public servant under sub-sec. (1) (a) there is no appeal, but if the order is a judicial order a revision will lie. Where the Joint Magistrate made a complaint under s. 188, I. P. C. for disobedience of an order passed under s. 145, Cr. P. C., the filing of the complaint by the Joint Magistrate was a judicial act and an application to the District Magistrate to have the complaint withdrawn must be deemed to be one in revision which the District Magistrate could not summarily dismiss without giving the accused an opportunity of being heard. *57 M. 1101*.

17. Orders under s. 528.—Under this section, the High Court has ample powers to deal with an application to revise an order of transfer under s. 528 on the ground that it was made on improper and inadequate grounds. *A. I. R. 1933 Sind 205 = 34 Cr. L. J. 861 = 144 I. C. 881 = 1933 Cr. C. 718*.

VIII.—INTERFERENCE IN REVISION WITH ORDERS OF ACQUITTAL.

18. In exceptional cases alone High Court will interfere [P. 973, n. 71]—It is obvious in the first place that the High Court has power to interfere with an order of acquittal in revision. Otherwise the Code would not contain the provisions in s. 439 (4) that in revision the High Court should not convert a finding of acquittal into one of conviction. The question is one of discretion as to whether in any particular case the Court should or should not order a retrial. 54 A. 413. But the High Court should ordinarily exercise its jurisdiction to interfere with an acquittal sparingly and only where it is urgently demanded in the interests of public justice. The fact that the High Court as a Court of Appeal might possibly have come to a different conclusion from the District Magistrate is no ground for exercising the revisional jurisdiction of the High Court against the order of acquittal made by him. 8 Rang. 663; A. I. R. 1930 Lah. 159 = 31 Cr. L. J. 584 = 123 I. C. 841 = 1930 Cr. C. 167. The High Court will not interfere with an acquittal in revision unless there has been an irregularity or illegality in the trial of the case or any error of law is shown to exist on the face of the judgment as to make it perverse. A. I. R. 1931 Nag. 102 = 31 Cr. L. J. 194 = 1931 Cr. C. 454 = 121 I. C. 51; A. I. R. 1933 Nag. 36 = 28 N. L. R. 298 = 34 Cr. L. J. 145 = 141 I. C. 273 = 1933 Cr. C. 78; A. I. R. 1933 Oudh 257 = 10 O. W. N. 345 = 34 Cr. L. J. 661 = 143 I. C. 852 = 1933 Cr. C. 562; A. I. R. 1935 Oudh 176 = 11 O. W. N. 810 = 1934 O. L. R. 659 = 35 Cr. L. J. 1236 = 150 I. C. 951 = 1935 Cr. C. 299; A. I. R. 1929 C. 639 = 33 C. W. N. 576 = 30 Cr. L. J. 1013 = 119 I. C. 130 = 1929 Cr. C. 357. Where a Sessions Judge, in an appeal against conviction suggested that the appeal could be disposed of without going into the evidence on the ground of want of jurisdiction in the trial Court, thereby overlooking the provisions of s. 531 of the Code, it was held to be an error of law as a result of which the Sessions Judge has not exercised the jurisdiction with which he was legally vested to try the appeal on its merits and the parties were entitled in law to have such jurisdiction exercised. 132 I. C. 50 = A. I. R. 1931 Oudh 273 = 8 O. W. N. 341 = 1931 Cr. C. 633 = 32 Cr. L. J. 828 = 16 A. I. Cr. R. 397.

19. High Court will not interfere with acquittal on reference under s. 438 [P. 974, n. 74]—In the case of an acquittal, where the Local Government does not appeal, or where the District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference under section 438. A. I. R. 1931 Lah. 533 = 1931 Cr. C. 773 = 134 I. C. 208 = 32 Cr. L. J. 1128 = 32 P. L. R. 789; A. I. R. 1933 Nag. 259 = 1933 Cr. C. 930 = 29 N. L. R. 365 = 35 Cr. L. J. 28 = 146 I. C. 332.

20. Revision against acquittal at the instance of private complainant [P. 974, n. 75]—It is competent for the High Court, if it thinks fit to interfere in revision at the instance of a private complainant to the extent of setting aside orders of acquittal and directing a retrial. 1932 Cr. C. 63 = 33 Cr. L. J. 280 = 136 I. C. 249 = 18 A. I. Cr. R. 38 = 8 O. W. N. 1333 = A. I. R. 1932 Oudh 31. But the High Court will not except in very special circumstances so interfere. A. I. R. 1933 Oudh 430 = 10 O. W. N. 1037 = 35 Cr. L. J. 121 = 146 I. C. 638 = 1933 Cr. C. 1315.

IX.—POWER TO ENHANCE THE SENTENCE.

21. When High Court will enhance sentence [P. 975, n. 80]—In a case where the sentence given is one from which no appeal lies, the High Court ought to be slow to exercise the power of enhancement because under sub-section (6) the accused is entitled before having the sentence enhanced, to challenge his conviction and where he has been given a sentence which is not appealable by a Presidency Magistrate, and there is no evidence recorded, he has really no material on which he can challenge his conviction and he is in a worse position than if he had been given an appealable sentence. In such case the power of enhancement should not be exercised unless the circumstances are special. A. I. R. 1935 B. 37 = 36 Bom. L. R. 1126 = 154 I. C. 577 = 1935 Cr. C. 71. In a case where material was within the knowledge of the prosecution before the conclusion of the trial and was not brought by the negligence of the prosecution to the notice of the trial Court, the High Court should refuse to interfere. To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of sentence would simply be to put a premium on the exercise of negligence by the prosecution themselves. A. I. R. 1929 A. 267 (2) = L. R. 10 A. (Cr.) 73 = 30 Cr. L. J. 505 = 115 I. C. 614 = 11 A. I. Cr. R. 503.

The High Court will not enhance the sentence in revision unless it is grossly inadequate. A. I. R. 1931 Lah. 132 = 32 P. L. R. 5 = 1931 Cr. C. 280 = 15 A. I. Cr. R. 475 = 132 I. C. 577 = 32 Cr. L. J. 943; A. I. R. 1931 Lah. 31 (1) = 1931 Cr. C. 95 = 130 I. C. 432 = 32 P. L. R. 273 = 32 Cr. L. J. 539 = 16 A. I. Cr. R. 40; 33 Cr. L. J. 365 = 136 I. C. 729 = A. I. R. 1932 Lah. 199 = 1932 Cr. C. 220 = 33 P. L. R. 49 = 17 A. I. Cr. R. 439;

A. I. R. 1934 Lah. 89 = 1934 Cr. C. 172 = 151 I. C. 924 = 35 Cr. L. J. 1453; A. I. R. 1934 Sind 157 = 152 I. C. 872 = 1934 Cr. C. 1149; 36 Bom. L. R. 954 = A. I. R. 1934 B. 471 = 153 I. C. 525 = 1934 Cr. C. 1343. It is erroneous to assume that a sentence can never be adequate unless it is of imprisonment. Unless the sentence is so inadequate as to have occasioned a failure of justice, the discretion of the Magistrate should not be interfered with, A. I. R. 1934 Nag. 117 (1) = 16 N. L. J. 194 = 35 Cr. L. J. 760 = 148 I. C. 884 = 1934 Cr. C. 495. The High Court is slow to interfere where interference would involve the imprisonment of persons already discharged from jail, though that circumstance is no insuperable obstacle. The Court frequently declines to interfere in order to enhance the sentence on the mere ground that it would itself have passed a heavier sentence. A. I. R. 1934 Lah. 613 = 35 P. L. R. 527 = 153 I. C. 449; A. I. R. 1929 Lah. 531 = 30 Cr. L. J. 300 = 114 I. C. 442 = 1929 Cr. C. 90; A. I. R. 1929 Lah. 194 = 30 Cr. L. J. 2 = 112 I. C. 769 = 11 A. I. Cr. R. 577.

22. Service of notice upon accused [*P. 976, n. 82*].—When a case comes to the knowledge of the High Court by an appeal having been filed it is not desirable, if the appeal is admitted, to issue a notice at the same time on the accused asking him to show cause why the sentence should not be enhanced. The Court must first of all deal with the appeal on the merits and it is only after disposing of the appeal that it can consider whether notice to enhance the sentence should issue. A. I. R. 1933 B. 153 = 35 Bom. L. R. 174 = 1933 Cr. C. 465. In 58 B. 392 it was however held that the proper course would be for the Court giving notice to enhance the sentence, to admit the appeal so that the appeal and the notice could be dealt with together. Where such notice is given, the Court should not dispose of the appeal before the notice is heard. It would be legal for the High Court to issue notice of enhancement when admitting an appeal but at the same time it would be desirable if, before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for. 53 M. 583.

Notice not necessary when accused already before Court.—There is nothing in s. 439 which requires that when accused persons are already before the Court by their Advocates or Pleaders it is nevertheless still incumbent upon the Court to issue notice to them to bring them before the Court a second time as it were; still less to issue a rule calling upon them to show cause. 61 C. 6.

23. Application for enhancement of sentence by private complainant [*P. 977, n. 84*].—The High Court does not ordinarily interfere on the application of a private complainant. 56 C. 964. But where the order against which complaint is made is the order of the Sessions Judge, it would not be possible to apply either to the Sessions Judge or the District Magistrate for enhancement of sentence. It is not intended by the Code that in these circumstances the only remedy of a complainant should be to apply to the District Magistrate to move the Government to apply for enhancement, because the Local Government will only apply for enhancement if the same is required in the public interest. The Court does not regard the question of enhancement only from the point of view of public interest but from the circumstances of the particular case before it. 53 A. 223. The words "or which otherwise comes to its knowledge" are very wide and the High Court may enhance the sentence on the application of a private person who was the complainant in the lower Court, especially when the enhancement has not been unfairly or vindictively urged. 8 Rang. 578. In A. I. R. 1933 Oudh 421 = 10 O. W. N. 903 = 35 Cr. L. J. 118 = 146 I. C. 577 = 1933 Cr. C. 1294 it was held that it was the part of the Crown not of individuals to ask the Courts to enhance sentences.

24. Dismissal of appeal or revision from conviction is no bar to revision for enhancement of sentence.—The dismissal of the appeal from conviction by the accused is in no way a decision that the sentences should not be enhanced. The question of enhancement is entirely foreign to an appeal and can only be dealt with in the revisional jurisdiction of the High Court. An appellate judgment of the High Court need not be kept pending merely for the disposal of a rule for enhancement. 10 Pat. 872 following 50 B. 783; 55 A. 715. The same principle applies when a revision against conviction has been dismissed. The question whether the sentence should be enhanced was not before the High Court when the previous revision was decided and when the question of enhancement is subsequently raised the High Court would not be reopening a matter which it had already decided. 36 Bom. L. R. 954 = A. I. R. 1934 B. 471 = 153 I. C. 525 = 1934 Cr. C. 1343.

25. High Court's power to enhance sentence beyond power of trying Magistrate [*P. 977, n. 86*].—Except in the specific case provided for in clause (3), the High Court's powers of enhancement are not in any way restricted and the High Court is competent to inflict any sentence which appears to be proper irrespective of the limits of the powers exercisable by the trial Court. A. I. R. 1935 Oudh 239 = 1935 O. W. N. 140 = 1935 O. L. R. 109 = 154 I. C. 93.

X.—RIGHT OF ACCUSED TO SHOW CAUSE AGAINST CONVICTION, SUB-SEC. (6).

26. Sub-section (6) [*P. 977, n. 87*].—When the accused is asked to show cause why the sentence should not be enhanced, he is entitled to appeal against both his conviction and the sentence, notwithstanding his plea of guilty. 12 Rang. 616.

27. Accused cannot show cause against conviction when appeal or revision against conviction has been dismissed by High Court itself.—This sub-section does not apply to a convicted person whose appeal has been heard by the High Court itself. The hearing of the appeal means hearing all that the appellant desires to say against the conviction and the sentence passed by the lower Court and at the hearing of the rule for enhancement after disposal of an appeal by the High Court, the appellant is outside s. 436 (6) altogether. 10 Pat. 872 following 50 B. 783; 54 B. 822. When a revision against conviction has been dismissed, in allowing the accused to show cause against his conviction when dealing with an application for enhancement of sentence, the High Court would be reconsidering what it had already decided. 36 Bom. L. R. 954 = A. I. R. 1934 B. 471 = 153 I. C. 525 = 1934 Cr. C. 1343.

28. When trial was by jury, whether accused can go into evidence in showing cause against conviction.—If a question of enhancement of sentence is before the Court, then the convicted person has only the same rights as regards challenging the actual conviction as he would have had if he had come before the Court by way of a regular appeal preferred by himself or by proceedings in revision instituted by himself. It follows that where a sentence has been passed after a verdict of guilty in a trial by jury, the arguments on behalf of the convicted person before the appellate Court must be limited to matters referred to in s. 423 (2). 61 C. 6.

SECTION 441.

Note.—Object of the section.—This section is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given; but to enable them to supply reasons where in exercise of their privilege under s. 370 they have given no reasons at all. A. I. R. 1930 M. 225 (1) = (1929) M. W. N. 893 = 3 M. Cr. C. 55 = 31 Cr. L. J. 460 = 122 I. C. 800 = 1930 Cr. C. 120 = 14 A. I. Cr. R. 341.

CHAPTER XXXIII.**SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN
AND INDIAN BRITISH SUBJECTS ARE CONCERNED.**

SECTION 443.

Notes.—1. Chapter applicable to trial of offences punishable with death or transportation also.—The plain and intended meaning of the words “punishable with imprisonment” is that in the case of all serious offences for which a sentence of imprisonment might be passed as distinguished from petty offences punishable with fine only, the procedure prescribed by this chapter could be resorted to. 13 Lah. 755.

2. Section not applicable to proceedings under s. 107.—The wording of the section obviously refers to an accused person charged with an offence punishable with imprisonment, and the time during which he can make a claim, before he is committed for trial under s. 213 or showing cause under s. 242 or entering on his defence under s. 256. The section does not contemplate anything like proceedings under s. 107 to which s. 242 does not apply at all. A. I. R. 1933 Lah. 1019 = 1933 Cr. C. 1556.

3. Revision.—An order upholding a claim is revisable by the High Court even though no appeal is provided against such an order. A. I. R. 1933 Lah. 1019 = 1933 Cr. C. 1556.

SECTION 446.

Notes.—1. Magistrate cannot cancel charge once framed.—This section appears to take away from the Magistrate the powers given him under s. 213 (2) in cases which are to be tried under the special provisions of Ch. XXXIII. In this view a person who has claimed a right to be tried as a European British subject forfeits another valuable right, namely, a right to have a charge against him cancelled if in the opinion of the

Magistrate there is not a sufficient case to justify commitment. This may be so, but whatever may have been the intention of the Legislature in framing s. 446, the effect of that section is to debar a Magistrate from cancelling a charge which has once been framed against a person who has claimed to be tried as a European British subject and whose claim has been upheld under s. 443. 53 A. 690.

2. Sub-section (1). Magistrate must consider whether there are grounds for discharging accused.—Before a Magistrate makes a commitment under sub-section (1) he must consider whether there are grounds for discharging the accused under s. 209 or s. 253 and he cannot do this without taking the evidence for the prosecution. Commitment without such preliminary inquiry must be quashed. 12 Pat. 707.

3. Sub-section (2). Magistrate's decision that this chapter applies is final.—Sub-section (2) renders final a decision by a Magistrate that the case is one to which Chapter XXXIII applies, and the Sessions Judge has no discretion in the matter. 13 Lah. 755.

SECTION 449.

Notes—1. Applicability of the section [P. 982, n. 2].—The decision in 3 Rang. 220 in so far as it was therein suggested or laid down that an appeal from the verdict and judgment in a trial held at the Sessions of the High Court would be under the provisions of s. 418, was overruled in 13 Rang. 104 (F. B.)

2. Right of appeal under s. 449 [P. 982, n. 4].—The right of appeal under s. 449 (1) (a) depends not upon whether in certain circumstances the accused might have been tried under the provisions of Ch. XXXIII, but whether he was in fact so tried. Unless the claim to be tried under Chapter XXXIII was duly made and had been determined by the Magistrate or by the Sessions Judge as the case might be, the right of the accused to be tried in accordance with the provisions of this chapter did not accrue. 13 Rang. 104 (F. B.)

3. Limitation [P. 983, n. 5].—S. 449 does not create a right of appeal against acquittal. Such right is created by s. 417 and s. 449 in its application to appeals against acquittals, merely has the effect of enlarging the scope of such appeals in certain classes of cases. The period of limitation for an appeal under s. 417 is six months under Art. 157, Sch. I, Limitation Act, whatever may have been the form of trial. 61 C. 991.

CHAPTER XXXIV.

LUNATICS.

SECTION 464.

Note.—Magistrate must inquire into fact of unsoundness [P. 984, n. 3].—Sub-section (1) cannot be regarded as directing that the inquiry shall be limited to an examination by a Civil Surgeon or other medical officer. The Court therefore ought to give an opportunity for the defence of rebutting the evidence given by the Civil Surgeon. A. I. R. 1933 Oudh 362 = 10 O. W. N. 719 = 34 Cr. L. J. 914 = 144 I. C. 1031 = 1933 Cr. C. 1042. The mandatory provisions of this section require not only that the accused should be examined by the Civil Surgeon or other medical officer, but the Civil Surgeon or other medical officer should also be examined as a witness. Where a Magistrate examined not the Civil Surgeon, but the House Surgeon, who was not an officer empowered by the Local Government, the order was unsustainable. A. I. R. 1933 Sind 267 = 35 Cr. L. J. 200 = 146 I. C. 850 = 1933 Cr. C. 941.

SECTION 465.

Note.—Fact of unsoundness of mind at time of trial should first be decided [P. 985, n. 2].—The procedure in the case of lunacy at the time of the trial and lunacy at the time of the commission of the offence are entirely separate matters leading to different consequences and these two matters must not be confused together. The first point that a Court has to decide when an accused person is brought before it, who is suspected or alleged to be a lunatic and before the Court can even proceed with the trial for the offence alleged to have been committed, is whether the accused appears to be of unsound mind and consequently incapable of making his defence. A. I. R. 1932 Oudh 190 = 1932 Cr. C. 373 = 9 O. W. N. 355 = 137 I. C. 800 = 33 Cr. L. J. 542 = 18 A. I. Cr. R. 319; A. I. R. 1930 A. 450 = L. R. 11 A. (Cr.) 107 = 31 Cr. L. J. 899 = 125 I. C. 787 = 1930 Cr. C. 970 = 14 A. I. Cr. R. 88.

SECTION 466.

Note.—Nature of order to be made.—Under this section the accused can be released only on security being given that the accused shall be properly taken care of, etc. Where a Magistrate passed an order that the accused should be released provided “a responsible gentleman comes forward to take care of her outside Karachi” *held* that there was nothing in the section to empower the passing of such a conditional order which cannot be sustained. A. I. R. 1933 Sind 267 = 35 Cr. L. J. 200 = 146 I. C. 850 = 1933 Cr. G. 941.

SECTION 468.

Note.—Court should record the finding that it considers the accused capable of making his defence.—When proceeding to act under this section it is desirable that the Court should place it on the record that it considers the accused to be capable of making his defence stating the grounds on which it came to that conclusion. A. I. R. 1934 Lah. 123 = 35 Cr. L. J. 869 = 148 I. C. 987 = 1934 Cr. G. 239.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION
OF JUSTICE.

SECTION 476.

Amendment.—In sub-section (1)—

(a) to the first paragraph, the following proviso shall be added, namely :—

“Provided that where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint”; and

(b) in the second paragraph, the word “Chief” shall be omitted—**Act II of 1926.**

I.—SCOPE OF THE SECTION.

Notes.—1. Relation between s. 195 and s. 476. *Is s. 476 supplementary to s. 195?* [*P. 994, n. 3*].—Under the present law there can be no complaint by a private person and all complaints that can be filed in respect of offences mentioned in s. 195 (1) (b) and (c) must be filed by the Court. The rule which lays down the procedure for a Court to file a complaint is to be found in s. 476. S. 195 lays down the bar and s. 476 lays down the method for removing the bar. These two sections must therefore be read together. A complaint outside the provisions of s. 476 cannot be filed by any Civil, Revenue or Criminal Court under its inherent jurisdiction. S. 476 and s. 195 (1) (c) have the same scope and the latter section does not comprehend offences which would be outside the purview of the former. 53 A. 804 (S. B.); 55 B. 461. *See* note 10, *infra*.

2. Whether Court may make a complaint in respect of offences not mentioned in s. 195.—A Magistrate is competent to make a complaint as a common informer, in respect of an offence not mentioned in s. 195 and which has come to his notice. A. I. R. 1933 Lah. 884 = 34 P. L. R. 1020 = 35 Cr. L. J. 86 = 146 I. C. 387 = 1933 Cr. G. 1178.

II.—COURTS EMPOWERED TO ACT UNDER THIS SECTION.

3. What is a Court? [*P. 995, n. 7*].—*See* note 9 to s. 195.

4. Section not applicable to Village Courts in Madras [*See P. 995, n. 9*].—A Village Court under the Madras Village Courts Act, 1889 cannot take action under this section as s. 77 of that Act makes the Criminal Procedure Code inapplicable to Village Courts except s. 403. (1934) M. W. N. 395.

5. Competency of successor to take action under this section [*P. 997, n. 12*].—A Court of law does not consist of the particular individual or individuals who may be presiding over the proceedings therein at any particular moment, but it is a permanent institution and therefore any judicial officer who sits in the Court is just as competent to deal with the matters coming before the Court as any other incumbent of the office. Therefore the words in the section “such Court” include the successor to the office. 58 C. 374.

6. Court to which case is transferred can complain.—If a case is transferred, not only the Court which originally received the forged document but any Court seized of the case may make a complaint. **A. I. R. 1930 M. 192 = (1930) M. W. N. 76 = 31 M. L. W. 334 = 3 M. Cr. C. 61 = 31 Cr. L. J. 986 = 126 I. C. 112 = 1930 Cr. C. 192.**

7. Sessions Judge may make a complaint when offence committed before Additional Sessions Judge.—There is only one Court of Session in each Sessions Division sitting at different places and manned by a number of Judges. An offence committed before the Additional Sessions Judge is therefore an offence committed in the Court of Session and the Sessions Judge is competent to make a complaint. **58 C. 1117.**

8. Powers of appellate Court to institute proceedings under this section [P. 998, n. 13].—See note 16 to s. 195.

III.—LIMIT OF TIME FOR TAKING ACTION.

9. Appropriate time for making an order under this section [P. 998, n. 15].—An order under this section should be made either at the close of the proceedings in the original trial or so shortly thereafter that it might reasonably be said that the order under s. 476 was really a continuation of the same proceedings in the course of which the offence was committed. **A. I. R. 1934 Oudh 272 = 11 O. W. N. 683 = 1934 O. L. R. 473 = 35 Cr. L. J. 908 = 149 I. C. 201 = 1934 Cr. C. 768; A. I. R. 1930 Lah. 316 = 31 Cr. L. J. 1135 = 126 I. C. 794 = 1930 Cr. C. 348.** But no hard and fast rule can be laid down that in all cases an order for prosecution under this section must be set aside on the ground of delay. **A. I. R. 1935 Oudh 113 = 1935 O. W. N. 28 = 1934 O. L. R. 980 = 153 I. C. 346 = 1935 Cr. C. 203.**

IV.—IN RESPECT OF WHAT OFFENCES ACTION MAY BE TAKEN.

10. Is it necessary that the person whose prosecution is ordered must be a party to the proceedings? [P. 1001, n. 17].—According to the Bombay High Court, s. 195 being a disabling section, s. 476 an enabling section, there is no reason why the powers under s. 476 should be strictly limited by reference to the disabilities imposed by s. 195. Once it is ascertained in judicial proceedings that there is an offence described in s. 195 (1) (c) and such offence appears to have been committed by a party to the proceedings, then, under s. 476, the Court can inquire into the matter and if it comes to the conclusion that other persons also, for example, witnesses are guilty of the offence, the Court can refer the whole case to a Magistrate for an inquiry and committal. This was so even under the old Code. **55 B. 461.** But the view of the Madras High Court appears to be that s. 476 must be confined to the exact offences referred to in s. 195 so that offences under s. 195 (1) (c) must be offences "alleged to have been committed by a party." **61 M. L. J. 684 = (1931) M. W. N. 1047 = 34 M. L. W. 841 = A. I. R. 1932 M. 129 = 1932 Cr. C. 109 = 136 I. C. 48 = 17 A. I. Cr. R. 395 = 33 Cr. L. J. 218 following 42 M. 540 (F. B.)** The language of s. 195 must be read in conjunction with the terms of s. 476 so that it is only in the case of offences committed by a party to the proceeding that the Court should take action under the latter section. **57 M. 682. See also A. I. R. 1934 Pesh. 81 (2) = 151 I. C. 697 = 1934 Cr. C. 1112; A. I. R. 1929 Lah. 125 (2) = 29 Cr. L. J. 1061 = 112 I. C. 565; 6 Luck. 86.** The Calcutta High Court has held that a person who was not a party gets no protection from cl. (c) of sub-section (1) of s. 195 and is not within the purview of s. 476 in respect of the offences mentioned in cl. (c). **58 C. 727.** But an offence mentioned in s. 195 (1) (d) is not restricted to the parties to the proceeding like clause (c) of that section. Such an offence may be committed by a person who is not a party to the proceeding, but if the Court is satisfied that such an offence in relation to a judicial proceeding has been committed, it can lodge a complaint under s. 476 against any person committing the offence. A Court can therefore file a complaint under s. 211, I. P. C. not only against the actual complainant but also against one who was instrumental in getting such a complaint filed. **58 C. 346; A. I. R. 1930 C. 671 = 52 C. L. J. 149 = 31 Cr. L. J. 1145 = 127 I. C. 65 = 1930 Cr. C. 1063 = 15 A. I. Cr. R. 77.**

11. Offences committed in or in relation to a proceeding in that Court [P. 1002, n. 20].—S. 476 can only apply to cases where by reason of a provision in the Code, the Magistrate requires a complaint by a Court in order that he may take cognizance of the charge. The words "in or in relation to a proceeding in that Court" means that the Court is not to take action where the offence has relation to a proceeding in some other Court. It is merely to identify the Court itself which is to take action under s. 476. **58 C. 727.** An offence described in s. 195 (1) (c) must in some manner have affected the proceedings or been designed to affect them, or come to light in course of them. An offence committed after the proceedings have terminated

but while the document is still among the Court records is wholly outside the scope of the provisions. **55 M. 531.** Action under this section can be taken only by the Court before whom the offence was committed. When no inquiry has been made and no order has been passed by that Court, neither the District Magistrate nor the Sessions Judge has jurisdiction to make an order directing the filing of a complaint. **8 Luck. 638.**

12. Cases where offences were held to have been committed in or in relation to proceedings in Court.

—A Sessions Judge has jurisdiction to direct the prosecution of the accused for perjury in respect of contradictory statements made before himself and before the committing Magistrate, for a statement by a witness at the preliminary inquiry is one made in relation to the subsequent proceedings in the Sessions Court. **55 M. 536; (1931) M. W. N. 1061 = 34 M. L. W. 377 = A. I. R. 1931 M. 778 = 4 M. Cr. C. 312 = 61 M. L. J. 914 = 33 Cr. L. J. 48 = 134 I. C. 1137.** Where a witness in a case before a Special Tribunal resiled from the statement made by him under s. 164 before a Magistrate, the Special Tribunal is competent to make a complaint as the statement under s. 164 was made in relation to a proceeding before it. **16 Lah. 153.** Statements made under s. 164 in the course of an investigation into an offence of murder which is triable only by a Sessions Court, must be held to be “in relation to” the trial in that Court. **(1933) M. W. N. 100 = A. I. R. 1933 M. 125 = 1933 M. Cr. C. 25 = 1933 Cr. C. 157 = 34 Cr. L. J. 92 = 140 I. C. 756; (1933) M. W. N. 896.** The accused made a statement which was recorded under s. 164 that S was driving the car when the accident happened. It was subsequently found that C and not S was driving the car and C was prosecuted. In the prosecution against C the accused deposed that C was driving the car. An application was made to make a complaint against the accused for the false statement made under s. 164. *Held*, that the statement under s. 164 was made in relation to the case which was subsequently tried on that matter even though the Court which tried the case did not record the statement. **65 M. L. J. 534 = (1933) M. W. N. 902 = 38 M. L. W. 564 = A. I. R. 1933 M. 767 = 1933 M. Cr. C. 270 = 1933 Cr. C. 1373 = 147 I. C. 794.** A complaint was made to a Sub-divisional Magistrate that certain persons had caused a false entry to be made in the Death Register. The Magistrate without examining the complainant referred the matter to the Inspector for inquiry and report. During the course of the inquiry the accused produced a post card found to be a forged document, for using which as genuine knowing it to be forged he was convicted by the Sub-divisional Magistrate. It was held that the user of a document in the course of the inquiry was user of it in or in relation to a proceeding in the Court of the Sub-divisional Magistrate and therefore that officer had no jurisdiction to take cognizance of it on a police report. **A. I. R. 1934 Pat. 156 = 15 P. L. T. 17 = 35 Cr. L. J. 1309 = 151 I. C. 320 = 1934 Cr. C. 340.** Where a decree passed by a Subordinate Judge was sent to the Collector for execution under s. 68, Civil P. C. and in the sale held by a Mamlatdar a forged receipt was filed showing adjustment of the decree, the offence of forging the document was committed in or in relation to proceedings in the Court of the Subordinate Judge and not in or in relation to any proceeding before the Mamlatdar constituting a Court. **59 B. 343.**

13. Cases where offences were held not to have been committed in or in relation to proceedings in Court.—Where a complaint was made to the Sub-divisional Magistrate against three persons and the Sub-divisional Magistrate transferred the case to the Bench Magistrates with reference to only two of them, the Bench Magistrates had no jurisdiction to make an order under this section to prosecute the complainant under s. 211, I. P. C. at the instance of the person whose case was not transferred to them. **7 Luck. 222.** When a charge is made by the complainant to the police against more than one individual and the police while charging before the Court one or more of such individuals with the offence complained of, do not charge them all, the Court has no jurisdiction to take action under this section against the complainant in respect of those not so charged. The mere fact that the telegram sent by the complainant was exhibited and filed in the case does not make the contents of it a matter “in relation to the proceeding” in the Court. **55 M. 611 (F. B.)**

V.—POINTS TO BE CONSIDERED BEFORE TAKING PROCEEDINGS.

14. Court should find that it is expedient in the interests of justice that an inquiry should be made.—It is only when the Court is expressly of opinion that it is expedient in the interests of justice that an inquiry should be made that an order under this section can be made. Where there is no such express finding, the order under this section must be vacated. **A. I. R. 1933 C. 147 = 1933 Cr. C. 224 = 144 I. C. 88 = 34 Cr. L. J. 684; A. I. R. 1930 C. 352 = 51 C. L. J. 208 = 126 I. C. 416; A. I. R. 1934 Oudh 272 = 11 O. W. N. 683 = 1934 O. L. R. 473 = 35 Cr. L. J. 908 = 149 I. C. 201 = 1934 Cr. C. 768; A. I. R. 1929 Lah. 676 = 30 P. L. R. 392 = 30 Cr. L. J. 666 = 116 I. C. 711 = 13 A. I. Cr. R. 99; 28 M. L. W. 774 = A. I. R. 1929 M. 74 = 2 M. Cr. C. 35 = 30 Cr. L. J. 370 = 114 I. C. 834.** The mere fact that the statements made by a witness before the Magistrate under s. 164 and before the committing Magistrate, were undoubtedly contradictory to those made in the Sessions

Court does not make it incumbent on the Court to order prosecution. The Court must exercise proper judicial discretion having due regard to its reaction on the administration of justice. **A. I. R. 1933 Nag. 179 = 34 Cr. L. J. 649 = 1933 Cr. C. 693 = 143 I. C. 747 ; A. I. R. 1933 Sind 412 = 1933 Cr. C. 1545 ; A. I. R. 1934 Sind 155 = 36 Cr. L. J. 10 = 152 I. C. 254 = 1934 Cr. C. 1147.** The Code lays down that the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made and therefore Courts should always make a record to that effect if that is their opinion, so as not to put the superior Courts to the task of discovering whether they mean something which they have not written. **56 M. 157 ; (1934) M. W. N. 923.** Although the provisions of this section are not mandatory but permissive, yet if the Court decides to make a complaint it must record a finding that in its opinion it is expedient in the interests of justice that an inquiry should be made. It would also be convenient and would save the time of an appellate Court if such a finding were expressly recorded. But an absence from the record of an express finding or a finding in the exact words of the section will not invalidate the complaint. It is sufficient if the record shows clearly that the Court has applied its mind to the question and has come to the conclusion that an inquiry is expedient. A finding that the evidence given was false followed by a complaint would probably be sufficient to raise the inference that the Judge found that an inquiry was expedient. **58 C. 1117 ; A. I. R. 1930 Lah. 347 = 32 Cr. L. J. 60 = 127 I. C. 859 = 1930 Cr. C. 395.** Merely to state that "there is material for prosecution" does not indicate that the Magistrate has in any way directed his mind to the question as to whether the order is expedient in the interests of justice. **52 C. L. J. 52 = A. I. R. 1930 C. 705 = 129 I. C. 110 = 1930 Cr. C. 1105.** It is not as if in all cases where the words of the section were not copied out in the judgment, the High Court would necessarily interfere in revision. In particular, in cases where the offence is of considerable gravity it will be manifestly unreasonable to take the view that the Court can have directed a complaint without considering whether it is expedient in the interest of justice so to do. **58 C. 965.** To set aside the proceedings of the lower Court merely by reason of the absence from its order of the exact words of the section would be an over-refinement of technicality which might lead to a failure of justice. **A. I. R. 1933 Pat. 713 = 14 P. L. T. 635 = 1933 Cr. C. 1536 = 147 I. C. 712 ; 1935 A. L. J. 395 = A. I. R. 1935 A. 608 (1) = 155 I. C. 490.** When a complaint is filed under this section it is not necessary that besides the complaint the finding of the Judge that it is necessary in the interests of justice to make an inquiry should also be forwarded along with the complaint. The presumption is that all legal formalities have been properly complied with. **A. I. R. 1933 Sind 37 = 26 S. L. R. 105 = 34 Cr. L. J. 305 = 142 I. C. 74 = 1933 Cr. C. 166.**

15. Power given under this section must be used with care [P. 1004, n. 25]—This section is meant to provide safeguards against reckless prosecutions and therefore a certain amount of care should be taken before a prosecution is ordered. When the complaint is of an offence under s. 193, I. P. C. the sentence or sentences should be quoted and the opposite parties should be given a chance to show cause against the proposed prosecution. With reference to a charge under s. 207, I. P. C. it should be specifically stated how the offence has been committed. **1933 A. L. J. 1623 = A. I. R. 1934 A. 385 = 3 A. W. R. 235 = L. R. 15 A. (Cr.) 166 = 35 Cr. L. J. 785 = 148 I. C. 866 = 1934 Cr. C. 464 = 21 A. I. Cr. R. 304.** Proceedings should not be undertaken at the instance of private persons unless the prosecution is clearly in the interest of the State and is reasonably certain to result in a conviction. **6 Luck. 86.**

16. In cases of false charge, opportunity must be given to the person against whom action is contemplated, to prove his case [P. 1005, n. 27]—It is settled law that no person should be proceeded against for making a false charge against another, unless he has been given an opportunity of substantiating his allegations by the Tribunal before which the charge is made and which proposes to take action against him. The Tribunal should come to a judicial finding that the allegations are *prima facie* false after giving an opportunity to the person concerned to prove his allegations before it. **13 Lah. 568.** But a conviction had without giving such opportunity cannot be held to be illegal. **A. I. R. 1934 Rang. 21 = 35 Cr. L. J. 1259 = 151 I. C. 185 = 1934 Cr. C. 182.** Where the Magistrate has discharged the accused under s. 253 holding that the case against the accused is groundless, and he has before him the report of the police in support of his view, it is not necessary that he should again ask the complainant to prove his case. **58 C. 346.**

17. There must be clear *prima facie* case against accused [P. 1005, n. 28]—The words that the Court must be of opinion that it is expedient in the interests of justice that an inquiry should be made, are the key-note to the section and in order to prosecute a man for perjury it must be shown that he has not merely given evidence which is contradictory, but evidence which is intentionally false. There must be a strong *prima facie* case which can serve as a foundation for making a complaint or for ordering an inquiry. **A. I. R. 1932 B. 551 = 34 Bom. L. R. 1247 = 34 Cr. L. J. 33 = 140 I. C. 619 = 1932 Cr. C. 783 ; A. I. R. 1934 Oudh 377 = 11 O. W. N. 1058 = 1934 O. L. R. 707 = 35 Cr. L. J. 1277 = 151 I. C. 290 = 1934 Cr. C. 1163.**

VI.—NECESSITY FOR PRELIMINARY INQUIRY.

18. **Holding of preliminary inquiry is only discretionary** [*P. 1007, n. 33*].—Under the present section a Magistrate filing a complaint, is no worse off than a private prosecutor and there is no necessity that there should be a preliminary inquiry before process issues. *A. I. R. 1931 Pat. 302 = 1931 Cr. C. 723 = 133 I. C. 172 = 12 P. L. T. 710 = 32 Cr. L. J. 1023*. A preliminary inquiry is only discretionary. *A. I. R. 1934 Pat. 536 = 15 P. L. T. 694 = 36 Cr. L. J. 26 = 153 I. C. 228 = 1934 Cr. C. 1191 ; A. I. R. 1935 Oudh 113 = 1935 O. W. N. 28 = 1934 O. L. R. 980 = 153 I. C. 346 = 1935 Cr. C. 203 ; 8 Rang. 25*. But although a preliminary inquiry may not legally be necessary, it should in common prudence be held by every Court before it passes an order under this section. *51 C. L. J. 45 = A. I. R. 1930 C. 282 = 127 I. C. 265 = 1930 Cr. C. 362 ; 58 C. 374*.

19. **When preliminary inquiry desirable** [*P. 1007, n. 34*].—Where the false evidence is alleged to have been given before an arbitrator and the Judge to whom an application is made under this section has not heard the evidence in the course of the trial himself, a preliminary inquiry is desirable. *58 C. 215*.

20. **Preliminary inquiry should be made by the Court itself.**—It is not open to a Civil Court, if it thinks that some preliminary inquiry is necessary, to proceed upon the basis of an inquiry by the police. The section contemplates that the inquiry should be made by the Court itself. As observed by *Waller, J.* in *50 M. 660* the nature, method and extent of the preliminary inquiry are entirely at the Court's discretion. The inquiry need not be such as to satisfy the Court that an offence has been committed but merely that an offence appears to have been committed. *58 C. 727*. In *58 C. 346* it was held that the preliminary inquiry may be conducted by the Court either by itself or by any other method available.

21. **Practice and procedure in preliminary inquiry** [*P. 1008, n. 36*].—*Person against whom application is made need not be heard in preliminary inquiry*.—The person against whom an application is made need not be given an opportunity of being heard upon the preliminary inquiry as he will have every opportunity of being heard by the Magistrate hearing the complaint. *58 C. 215*. There is nothing in the section making it obligatory on the Court to issue notice before taking action under the section. *A. I. R. 1935 Oudh 113 = 1935 O. W. N. 28 = 1934 O. L. R. 980 = 153 I. C. 346 = 1935 Cr. C. 203*. Where the Magistrate failed to record a finding as to the expediency of filing a complaint and the Sessions Judge remitted the proceedings to the Magistrate for recording such a finding, and the Magistrate then recorded such a finding without giving notice to the parties, the order was held to be legal. (*1934 M. W. N. 192*).

VII.—PRACTICE AND PROCEDURE OF COURT SENDING CASE.

22. **Finding and complaint may be contained in the same order.**—Where in the same document the Judge has set forth the particulars in respect of which he considers that false evidence was given and the nature of the proofs that that evidence was in fact false, the document serves the double purpose of a finding that it is expedient in the interests of justice that an inquiry should be made and also a complaint and is a sufficient compliance with the requirements of the section. *54 M. 331*.

23. **Court may direct prosecution when moved by stranger** [*P. 1009, n. 41*].—Under the wording of the section there is no restriction made as to the persons by whom an application can be made and therefore a pleader is none the less competent to make an application. Proceedings under this section are not matters *inter partes*. The section definitely contemplates action by the Court on its own initiative. Therefore an irregular application does not debar the Court from acting in the matter at all. *58 C. 374*.

24. **Application to complain once dismissed can be re-entertained.**—It has been the law in Madras since the decision in *29 M. 126 (F. B.)* that a Magistrate can dismiss a complaint under s. 203 and rehear it on the following day. It would seem to follow that he is equally competent to dismiss an application to complain and to re-entertain it later. *61 M. L. J. 686 = (1931) M. W. N. 1048 = 34 M. L. W. 629 = A. I. R. 1932 M. 130 = 4 M. Cr. C. 349 = 1932 Cr. C. 109 = 33 Cr. L. J. 272 = 136 I. C. 313 = 17 A. I. Cr. R. 464 ; See also 8 Pat. 736 ; A. I. R. 1935 Pesh. 1 = 1935 Cr. C. 81 = 153 I. C. 947 ; A. I. R. 1930 Sind 315 = 24 S. L. R. 446 = 1930 Cr. C. 1147*.

25. **Should the order specify the offence?** [*See P. 1009, n. 42*].—Sections 476 and 195 are intended really to prevent indiscriminate prosecutions under the various sections mentioned therein. Once the bar is removed, there is no difference between the cases mentioned in ss. 476 and 195 and any other case, *e.g.*, if a complaint is filed under s. 471, I. P. C. and it appears that some other offence has also been committed, it is not necessary to have a fresh complaint. *A. I. R. 1934 Pat. 536 = 15 P. L. T. 694 = 36 Cr. L. J. 26 =*

152 I. C. 228 = 1934 Cr. C. 1191. When a valid complaint is made under this section the Court to which the complaint is made is entitled to take cognizance of all or any of the offences that may be alleged, even though the numbers of the sections may not have been given in the complaint. (1933) **M. W. N. 1261.**

26. Order sending case must not be vague [*P. 1009, n. 42*].—A complaint under s. 195 read with this section should disclose the Court before which and the occasion on which the offence is alleged to have been committed. **A. I. R. 1932 Pat. 243 = 13 P. L. T. 370 = 1932 Cr. C. 640 = 139 I. C. 543 = 33 Cr. L. J. 860.** In a complaint of giving false evidence, the Court should describe with sufficient precision the passages in the deposition of the accused as a witness, which are alleged to amount to false evidence. **28 M. L. W. 774 = A. I. R. 1929 M. 74 = 2 M. Cr. C. 35 = 30 Cr. L. J. 370 = 114 I. C. 834; A. I. R. 1930 Rang. 153 = 31 Cr. L. J. 1060 = 126 I. C. 530 = 1930 Cr. C. 585.**

IX.—REVISION OF ORDERS.

27. High Court will not ordinarily interfere with the discretion of the lower Court [See *P. 1013, n. 58*].—The question of the propriety of the prosecution is in the first instance a matter for the discretion of the Courts affected, a discretion with which the High Court in revision would not lightly interfere. **A. I. R. 1932 Pat. 243 = 13 P. L. T. 370 = 1932 Cr. C. 640 = 139 I. C. 543 = 33 Cr. L. J. 860.** The High Court ought to be very reluctant to interfere with an order under sections 476 or 476-B, where the Court which makes the order seems to be fully conversant with all the facts of the case; and if the High Court is satisfied from the materials before it that the case is one where there ought to be a prosecution, it does not seem necessary or even desirable that the High Court should send back the case to the Court which heard the matter on appeal, merely because there has been some irregularity. **58 C. 402.**

28. Power of High Court under s. 439 to revise orders made by Courts other than Criminal [*P. 1014, n. 59. See also P. 1018, n. 6*].—When an order under s. 476 is passed by a Civil or Revenue Court, s. 439 has no application, but the High Court can exercise its revisional power under s. 115, Civil P. C. All such applications under ss. 476, 476-A and 476-B originating in Civil Courts must therefore be dealt with according to the provisions of the Civil Procedure Code. If the provisions of the Civil P. C. do not apply, the provisions of the Criminal Procedure Code under Ch. XXXI are applicable except where it is clear from the sections themselves that the provisions are restricted to matters arising solely under that Chapter. S. 476-B is not intended to be exhaustive but provides powers supplementary to those given under Ch. XXXI. **59 C. 68; A. I. R. 1935 Oudh 59 = 11 O. W. N. 1469 = 1934 O. L. R. 949 = 153 I. C. 104 = 1935 Cr. C. 113.** According to the Allahabad High Court, a revision against an order of a Civil Court acting under s. 476, Cr. P. C. can only lie under s. 115, Civil P. C. and s. 439, Cr. P. C. has no application. **51 A. 344. See also 58 C. 374.** Where the District Munsiff ordered a complaint to be filed but the District Judge on appeal withdrew the complaint, *held* that an application in revision against the order of the District Judge was governed by s. 115, Civil P. C. **A. I. R. 1934 Pat. 55 (1) = 1934 Cr. C. 83 = 147 I. C. 535 = 35 Cr. L. J. 432.** It was however held by a Full Bench of the Lahore High Court that where a Civil, Criminal or Revenue Court refuses to make a complaint and the appellate Court accepts the appeal, revision lies to the High Court under s. 439, Criminal Procedure Code. **13 Lah. 342 (F. B.); See also A. I. R. 1931 Lah. 105 = 32 P. L. R. 46 = 1931 Cr. C. 169 = 131 I. C. 216 = 32 Cr. L. J. 647 = 16 A. I. Cr. R. 282; A. I. R. 1929 Lah. 676 = 30 P. L. R. 392 = 116 I. C. 711 = 30 Cr. L. J. 666 = 13 A. I. Cr. R. 99.**

A Deputy Commissioner entertaining an appeal under s. 476-B against a complaint made by the Land Registration Deputy Collector has a dual capacity, *viz.*, a Revenue Officer as also a District Magistrate. His order can be revised under s. 439, in so far as the Deputy Commissioner must be taken to have acted in his Magisterial capacity and in any event the High Court can interfere under s. 107, Government of India Act. **A. I. R. 1931 Pat. 411 = 12 P. L. T. 671 = 1931 Cr. C. 999 = 33 Cr. L. J. 147 = 135 I. C. 513.**

X.—STAY OF PROCEEDINGS.

29. When stay of Criminal Proceedings desirable [*P. 1015, n. 65*].—Proceedings under s. 476 need not be postponed till the disposal of the Civil appeal, if any, against the order of the Munsiff who found the document to be forged, and who accordingly made a complaint under this section. **A. I. R. 1930 C. 578 = 31 Cr. L. J. 1154 = 127 I. C. 64 = 1930 Cr. C. 892; A. I. R. 1930 Pat. 194 = 30 Cr. L. J. 1144 = 120 I. C. 45.** Where a person has filed an appeal against the order of the lower Court finding a receipt filed by him to be false and meanwhile at the instance of the complainant the original Court made a complaint against him under s. 476 of offences under s. 467 read with s. 471, I. P. C. in ordering stay of proceedings, the question to be considered is in which way the balance of convenience lies, and in a case like the above the proper order to

make would be to order the criminal case to proceed and the evidence to be duly recorded, but final orders should not be passed till the civil appeal is decided. *A. I. R. 1931 Lah. 49 = 130 I. C. 651 = 32 P. L. R. 303 = 1931 Cr. C. 113 = 32 Cr. L. J. 584.*

SECTION 476-A.

Note.—Where an offence was alleged to have been committed before the Subordinate Judge as Election Commissioner, it is open to the District Judge to make a complaint of that offence under this section being the principal Court having ordinary civil jurisdiction within the local limits of whose jurisdiction, the election Court was situate. (1935) *M. W. N. 152* (2).

SECTION 476-B.

Notes.—1. Scope of the section.—It is the intention of the Legislature that the remedy open to a person aggrieved by a complaint under s. 476 should be limited to an appeal under this section and that it is not permissible to call the complaint in question in the course of an appeal against conviction. *55 C. L. J. 336 = 1932 Cr. C. 545 = 140 I. C. 544 = 34 Cr. L. J. 39 = A. I. R. 1932 C. 545; 49 C. L. J. 193 = A. I. R. 1929 C. 203 = 30 Cr. L. J. 656 = 116 I. C. 632 = 13 A. I. Cr. R. 73.*

2. Duty of the appellate Court under s. 476-B [P. 1017, n. 3].—The appeal is not against the finding that it is expedient in the interests of justice to make a complaint. The mere fact that a complaint has been made, opens the way to an appeal whether or not there is such a finding. *8 Rang. 25.* If the appellate Court finds that the materials on the record did not justify the hope that the prosecution would end in the conviction of the accused person, it could properly refuse to sanction the prosecution. It is not necessary that it should also find that it was not expedient in the interests of justice that the trial should proceed. *1934 A. L. J. 870 = A. I. R. 1934 A. 1065 = 4 A. W. R. 342 = 1934 A. L. R. 928 = 152 I. C. 34.* But if the appellate Court should order a prosecution, the condition laid down in s. 476 that before ordering a prosecution the Court should find that it is expedient in the interests of justice that an inquiry should be made and that it should record its finding on that point equally applies to the appellate Court when acting under s. 476-B. *A. I. R. 1931 Sind 115 = 25 S. L. R. 68 = 1931 Cr. C. 733 = 134 I. C. 1007 = 33 Cr. L. J. 43.*

3. Appeal lies to the Court to which such former Court is subordinate within the meaning of s. 195 (3).—The determination of the superior Court, is not confined to the decrees which are appealable. Even though the suit was one in which no appeal lay to any Court, the Court to which an appeal would lie if an appealable decree had been passed, will be the appellate Court for the purposes of this section. *A. I. R. 1930 A. 407 = 1930 A. L. J. 1010 = L. R. 11 A. (Cr.) 101 = 31 Cr. L. J. 898 = 125 I. C. 753 = 1930 Cr. C. 631 = 14 A. I. Cr. R. 52.*

(i) *Appeal from the Assistant Sessions Judge lies to the Sessions Judge*—Under this section the appeal from the order of the Assistant Sessions Judge lies to the Court to which it is subordinate, within the meaning of s. 195 (3), that is, the Court to which appeals from such Court ordinarily lie. An appeal from the Assistant Sessions Judge lies to the Sessions Judge and in certain cases to the High Court. But ordinarily an appeal from the Assistant Sessions Judge lies to the Court of Session even though an Assistant Sessions Judge is a member of that Court. If it also ordinarily lies to the High Court, proviso (a) to s. 195 (3) applies and the appeal under s. 476-B must be held to lie to the Court of inferior jurisdiction, namely, the Court of Session. *60 C. 596.*

(ii) *Appeal from District Munsiff's order must be heard by District Judge*—The Court of the District Judge is the only Court to which that of the Munsiff is subordinate within the meaning of s. 195 (3) and the District Judge has no power to transfer an appeal under this section to the Subordinate Judge for hearing. *A. I. R. 1933 Pat. 179 (2) = 14 P. L. T. 131 = 34 Cr. L. J. 410 = 1933 Cr. C. 510 = 142 I. C. 621; A. I. R. 1934 Pat. 366 = 15 P. L. T. 303 = 35 Cr. L. J. 1061 = 150 I. C. 239 = 1934 Cr. C. 798; A. I. R. 1935 A. 212 = 1935 A. L. J. 66 = 1935 Cr. C. 255; 1935 A. L. J. 473 = A. I. R. 1935 A. 440; 1935 A. L. J. 476 = A. I. R. 1935 A. 446 (2).* But see *51 A. 344.* In *57 C. 831* it was held that a District Judge to whom an appeal has been preferred under this section has power to transfer the same to the Additional District Judge.

(iii) *Appeal from order of Munsiff and Subordinate Judge while exercising Small Cause jurisdiction lies to the District Judge*—A Small Cause Court is a Court from the orders and decrees of which no appeal ordinarily lies, and this applies whether the Court is a regular Small Cause Court or is merely the Court of a Munsiff invested with special powers as a Judge of the Small Cause Court. The appeal from such an order lies to the principal Court having ordinary Original Civil jurisdiction, that is, the District Judge. The District

Judge has to dispose of the appeal himself and not transfer it to the Subordinate Judge. 1935 A. L. J. 476 = A. I. R. 1935 A. 446 (2) ; 1935 A. L. J. 671 = A. I. R. 1935 A. 573. The Court of a Subordinate Judge exercising the powers of a Small Cause Court is also subordinate to the Court of the District Judge, and an appeal lies to the latter Court. A. I. R. 1929 Oudh 515 = 6 O. W. N. 848 = 31 Cr. L. J. 205 = 121 I. C. 90 = 1929 Cr. C. 589.

(iv) *Appeal from order of District Magistrate lies to Sessions Judge*—According to s. 17 a District Magistrate is not subordinate to the Sessions Judge except to the extent and in the manner expressly provided in the Code, but as a Court, the District Magistrate's Court is only a Court of a Magistrate, First Class, and is subordinate to the Court of the Sessions Judge for the purposes of s. 195 (3). An appeal therefore under s. 476-B will lie to the Court of the Sessions Judge from an order passed by the District Magistrate under s. 476-A. A. I. R. 1929 Nag. 97 (F. B.) = 25 N. L. R. 1 = 30 Cr. L. J. 550 = 116 I. C. 77 = 12 A. I. Cr. R. 345.

(v) When a complaint is filed by the Collector in respect of an offence committed in or in relation to a rent suit under the Agra Tenancy Act, an appeal lies to the District Judge under this section. 1934 A. L. J. 867 = A. I. R. 1934 A. 886 = 4 A. W. R. 241 = 1934 A. L. R. 733 = 35 Cr. L. J. 1136 = L. R. 15 A. (Cr.) 169 = 1934 Cr. C. 1116 = 150 I. C. 775.

4. *Appeal lies even if the complaint is filed by the Court suo motu.*—The terms of the section does not support the view that an appeal will lie only when the complaint is made at the instance of an applicant. Under the present section the procedure has been radically altered from what it was under the old section and any analogy between the two is likely to be misleading. 54 M. 331 (*dissenting from* A. I. R. 1929 Lah. 9 = 113 L. C. 537 = 30 Cr. L. J. 163) ; 52 A. 79 ; 11 Lah. 55.

5. *Superior Court itself to make the complaint.*—There is no provision in law by which the Sessions Judge can direct the Additional District Magistrate to prefer a complaint under s. 476-B. The superior Court may itself make the complaint. A. I. R. 1931 M. 768 = 1931 Cr. C. 928 = 134 I. C. 1216 = (1931) M. W. N. 713 = 33 Cr. L. J. 51.

6. *Whether an appeal lies to the High Court under this section from an appellate order making a complaint which the original Court refused to make* [P. 1017, n. 5]—The natural construction to place on the words of the section is that only one appeal should lie, and that when an appellate Court has made a complaint under this section, or has refused to make a complaint, no further appeal should lie to the High Court. 53 A. 416 ; 53 A. 594 ; A. I. R. 1929 A. 898 = L. R. 10 A. (Cr.) 147 = 30 Cr. L. J. 1148 = 120 I. C. 116 = 1929 Cr. C. 490 = 13 A. I. Cr. R. 1. Under s. 476-B a right of appeal is given to the person against whom "such a complaint" has been made, and "such a complaint" means in the context, a complaint under s. 476 or s. 476-A and the section does not in terms give a right of appeal against a complaint made under the section itself, that is under s. 476-B. There is therefore no right of appeal to the High Court from the appellate order of the lower Court, of whatever character that order may be. 59 B. 340. But it was held by the Patna High Court that having reference to s. 195 as it formerly stood, the Legislature intended that when a Court orders a prosecution under s. 476-B, there should be in law an appeal to the High Court. 10 Pat. 446.

7. Procedure on appeal and powers of the appellate Court.

(i) *Power to order remand*—The procedure on an appeal under this section must be procedure on an appeal under the Code. It follows therefore that as the Code provides no remand, the appellate Court cannot make a remand to the trial Court. But the appellate Court may itself make an inquiry in a case where it comes to the conclusion either that the trial Court has made no inquiry at all or has made a defective inquiry. 13 Lah. 342 (F. B.). Once the appellate Court accepts the appeal under s. 476-B, it becomes *functus officio* and no order can be made directing the lower Court to make a further inquiry into the alleged commission of the offence. A. I. R. 1933 Oudh 59 = 11 O. W. N. 1469 = 1934 O. L. R. 949 = 153 I. C. 104 = 1935 Cr. C. 113.

Contra—An order of remand by the appellate Court and a complaint filed by the lower Court after further inquiry was not only not contrary to any positive prohibition contained in the Code, but was in strict conformity with it. Even if it were an irregularity the defect was cured by s. 537. A. I. R. 1930 Sind 315 = 24 S. L. R. 446 = 1930 Cr. C. 1147. The provisions of Chapter XXXI are applicable to an appeal under s. 476-B and a remand for proper disposal is competent under clauses (c) and (d) of s. 423. 57 M. 177 (F. B.) ; 65 M. L. J. 534 = (1933) M. W. N. 902 = 38 M. L. W. 564 = A. I. R. 1933 M. 767 = 1933 M. Cr. C. 270 = 1933 Cr. C. 1373 = 147 I. C. 794.

An appeal to the District Judge from the order of the Munsiff is governed by order 41, Civil Procedure Code and the District Judge has therefore power to remand the case to the lower Court. 49 C. L. J. 374 = A. I. R. 1929 C. 428 = 1929 Cr. C. 54.

(ii) *Power to take additional evidence*—The calling for further evidence is not permissible under s. 428. 57 M. 177 (F. B.) The appellate Court could not take additional evidence under s. 428 because that section is specifically limited to appeals under the chapter in which it occurs, but the appellate Court could take all evidence necessary for making or completing the preliminary inquiry. 13 Lah. 342 (F. B.) The appellate Court in such cases, has inherent jurisdiction to take additional evidence. A. I. R. 1931 Sind 115 = 25 S. L. R. 68 = 1931 Cr. C. 733 = 134 I. C. 1007 = 33 Cr. L. J. 43.

(iii) *Power to dismiss appeal summarily*—S. 421 applies to all appeals unless it is specifically provided otherwise. Hence a Magistrate is entitled to dispose of an appeal under this section summarily. A. I. R. 1931 Pat. 144 = 12 P. L. T. 336 = 32 Cr. L. J. 735 = 131 I. C. 536 = 1931 Cr. C. 360 = 16 A. I. Cr. R. 348; 65 M. L. J. 534 = (1933) M. W. N. 902 = 38 M. L. W. 564 = A. I. R. 1933 M. 767 = 1933 M. Cr. C. 270 = 1933 Cr. C. 1373 = 147 I. C. 794; 58 C. 402. The appellate Court ought to go into the merits of the case as it is bound to do in all appeals before it. 57 C. 500. The appellate Court if it happens to be the District Judge, cannot dismiss the appeal summarily under O. 41, R. 11, Civil P. C., as an appeal under s. 476-B Cr. P. C. is governed by that Code and the records must be sent for and notice issued to the parties concerned. 51 C. L. J. 45 = A. I. R. 1930 C. 282 = 127 I. C. 265 = 1930 Cr. C. 362.

(iv) *Power to stay proceedings*—Even if s. 476-B be read with Chapter XXXI of the Code, an order for stay of criminal proceedings cannot be passed in an appeal, under s. 423. The District Magistrate cannot therefore stay the criminal proceedings pending before the Sub-divisional Magistrate, under this section. A. I. R. 1931 Pat. 411 = 12 P. L. T. 671 = 33 Cr. L. J. 147 = 135 I. C. 513 = 1931 Cr. C. 999.

8. *Procedure*—Each accused should prefer separate appeal.—Under this section an appeal may be preferred by “any person against whom a complaint has been made.” It is not stated that an appeal lies from an order directing a complaint to be made. Where separate petitions have been filed against the several accused, even though the Court passes one order disposing of them all, each accused should prefer a separate appeal. (1933) M. W. N. 100 = A. I. R. 1933 M. 125 = 1933 M. Cr. C. 25 = 1933 Cr. C. 157 = 34 Cr. L. J. 92 = 140 I. C. 756.

9. *The provisions of s. 367 regarding contents of judgment, applies to judgments in appeals under this section.*—Where in an appeal under this section the appellate Court passed the judgment “Heard the appellant. I do not think it necessary to direct prosecution of the respondent in this case. Appeal dismissed” it was held that the judgment did not fulfil the requirements of law. The provisions of s. 367 will apply to appeals under s. 476-B. Even if the Civil Procedure Code were applicable, the result would be the same, as in that case O. 41, R. 31 would apply. 35 C. W. N. 660 = 1931 Cr. C. 606 = 133 I. C. 672 = 32 Cr. L. J. 1045 = A. I. R. 1931 C. 454.

10. *Revision.* See notes 27 and 28 to s. 476.

SECTION 480.

Note.—When there is no intention to insult there can be no contempt [P. 1020, n. 5]—Where a Sessions Judge fined an assessor on the ground that he was improperly dressed by not wearing a coat, it was held that there being no rule as to the dress of assessors and there being no suggestion that the particular dress offended against any rule of public decency or was intended to be insulting to the Court, the Judge had no jurisdiction to fine the assessor. A. I. R. 1933 B. 478 = 35 Bom. L. R. 1025 = 1933 Cr. C. 1552 = 146 I. C. 550 = 35 Cr. L. J. 107.

SECTION 481.

Note.—Sub-section (2) is mandatory [P. 1022, n. 1]—Omission to set forth the particulars as required by sub-section (2) is not merely an irregularity which could be corrected by the application of s. 537, but is fatal to the proceedings. A. I. R. 1931 Nag. 193 = 14 N. L. J. 106 = 1931 Cr. C. 831 = 134 I. C. 684 = 32 Cr. L. J. 1221.

SECTION 487.

Note.—Where a Magistrate drew up proceedings under s. 174, I. P. C. against a witness for not appearing to give evidence in another case on the date on which he was summoned to appear, the Magistrate could not himself try and convict the accused even if the accused consents to the trial by the same Magistrate. A. I. R. 1934 Lah. 545 (1) = 35 P. L. R. 454 = 153 I. C. 514 = 1934 Cr. C. 865.

CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

SECTION 488.

I.—SCOPE AND NATURE OF PROCEEDINGS.

Notes.—1. **Applicability of section to parties governed by special marriage laws** [*P.* 1031, *n.* 8]—*Sambundham marriage*—Independent of any legislative enactment, the law of Malabar does not recognise marriage as a legal institution, the relation being in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases. The offspring of such a connection would be entitled to an order for maintenance against the father, only if and when the mother's *thavazhi* or *tarwad* is unable to maintain them. 65 M. L. J. 629 = (1933) M. W. N. 1276 = 38 M. L. W. 587 = A. I. R. 1933 M. 794 = 1933 M. Cr. C. 337 = 34 Cr. L. J. 1159 = 145 I. C. 970 = 1933 Cr. C. 1399.

II.—JURISDICTION AND COMPETENCY OF COURTS.

2. **Jurisdiction**—Where the person “resides or is or last resided” [*P.* 1031, See *n.* 10]—Where the parties left their permanent residence and came to another place where they stayed for two months and after returning from that place, the husband married another wife and the former wife applied under this section, to the Court at the place where they temporarily resided for two months, it was held following 54 B. 548, that the Court where the temporary residence took place had jurisdiction. A. I. R. 1932 Nag. 85 (2) = 15 N. L. J. 24 = 1932 Cr. C. 435 = 140 I. C. 394 = 34 Cr. L. J. 32. When the parties last resided together in Trichinopoly District, even though the husband was permanently employed in Nagpur, the Magistrate at Trichinopoly had jurisdiction to entertain an application under this section. (1935) M. W. N. 475.

3. **Wrong Court** [*P.* 1031, *n.* 11-A]—The order under s. 488 will not be vitiated merely because the proceedings were held in a wrong district. S. 531 and not s. 530 (*n.*) applies to such cases. 49 C. L. J. 205 = A. I. R. 1929 C. 336 = 30 Cr. L. J. 525 = 115 I. C. 602 = 12 A. I. Cr. R. 343.

III.—CONFLICT OF ORDERS OF CIVIL AND CRIMINAL COURTS.

4. **Consent order under s. 488 is no bar to civil suit for restitution of conjugal rights.**—An order under s. 488 is no bar to a civil suit for restitution of conjugal rights and it makes no difference whether such an order was made after contest or by consent, unless it were expressed in the consent given, that the consenting party agreed that in all circumstances the wife should live apart from the husband and she should be entitled to the maintenance agreed upon. 54 M. 558.

5. **Pendency of civil suit for restitution of conjugal rights no bar to order under this section.**—Where the husband has filed a suit for restitution of conjugal rights, the Civil Court has no jurisdiction to restrain the opposite party by an injunction from pursuing her remedy in the Criminal Court. A. I. R. 1930 C. 753 = 32 Cr. L. J. 232 = 129 I. C. 103 = 1930 Cr. C. 1153.

6. **Existence of Civil Court's decree for maintenance, not a bar to order under this section.**—The mere fact that a Civil Court has passed a decree for maintenance is no bar to an application under this section, when the Civil Court's decree has become unexecutable owing to the husband having applied to be adjudicated insolvent. 31 Bom. L. R. 1366 = A. I. R. 1930 B. 144 = 31 Cr. L. J. 609 = 124 I. C. 127.

IV.—CONDITIONS NECESSARY FOR AN ORDER FOR MAINTENANCE.

7. **Any person having sufficient means may be directed to maintain his wife or child** [*P.* 1034, *n.* 22]—By becoming a *Sadhu* a person cannot get over his liability under this section. Where marriage involves status, a person by taking vows and becoming a *Sadhu* cannot affect the status of his wife and turn her from a married woman into an unmarried woman. But if he can prove that by reason of the vows which he has taken he is incapable of holding property or of earning any money which will enable him to maintain his wife without incurring such serious consequences that no Court could expect him to incur them, then in fact he cannot be said to have sufficient means. 56 B. 260. A Burmese Buddhist Monk is similarly liable for the maintenance of his child. 11 Rang. 226 (F. B.)

What is "sufficient means"—It is too narrow to define the word "means" as visible means, that is, some income, revenue, estate or property. "Means" includes a capacity to earn money. If a man is capable of earning money then he has the means to maintain his wife. 56 B. 260.

8. **Order may be made only against husband or father of child** [P. 1035, n. 23]—The husband's father cannot be ordered to pay maintenance to the daughter-in-law. 32 P. L. R. 346 = A. I. R. 1931 Lah. 532 = 32 Cr. L. J. 1175 = 134 I. C. 488 = 1931 Cr. C. 772.

9. **Proof of valid marriage and existence of marital relation necessary** [P. 1035, n. 24]—Where the marriage is disputed the Magistrate should himself try and decide the question and not refer the parties to a civil suit. A. I. R. 1932 Lah. 301 = 33 P. L. R. 230 = 33 Cr. L. J. 447 = 137 I. C. 30 = 1932 Cr. C. 381. Where the marriage took place 17 or 18 years before, and the priest who celebrated the marriage was dead, the parties had lived together as man and wife for many years and in a passport issued to the husband the woman was described as his wife, it would not be reasonable to expect very strict proof of the actual celebration of the marriage. 59 C. 1257. A marriage between an Adi Dravida woman and a Naidu was held to be a valid marriage entitling the wife to claim maintenance under this section. 66 M. L. J. 543 = (1934) M. W. N. 185 = 39 M. L. W. 439 = A. I. R. 1934 M. 323 = 1934 M. Cr. C. 36 = 35 Cr. L. J. 852 = 148 I. C. 921 = 1934 Cr. C. 609. Mere cohabitation for a long number of years does not have the effect of a legal marriage. A. I. R. 1934 Rang. 166 = 35 Cr. L. J. 4502 = 151 I. C. 1089 = 1934 Cr. C. 783.

10. **Child must be "unable to maintain himself"** [P. 1035, n. 26]—In determining whether a boy is able to maintain himself, one must see whether having regard to the social position of the father as well as of the boy, he would be able to find a suitable employment, even if he made any attempt in that direction. 39 C. W. N. 432 = 61 C. L. J. 141.

11. **Actual neglect or refusal to maintain, must be established** [P. 1036, n. 29]—In order to give jurisdiction to a Magistrate to take proceedings under this section, the first essential is to find that the respondent had neglected or refused to maintain the person for whose maintenance an allowance is asked for. A. I. R. 1930 Lah. 886 = 31 P. L. R. 876 = 32 Cr. L. J. 196 = 129 I. C. 17 = 1930 Cr. C. 982.

Y.—WIFE'S RIGHT TO MAINTENANCE.

12. **Right to maintenance is purely personal, and cannot be assigned.**—The right created by the order of the Criminal Court is a purely personal one, a right which is not assignable and consequently not liable to be sold in execution of a decree for money in view of the provisions of s. 60 of the Civil Procedure Code. Such a right cannot be assigned by the wife. 62 C. 404.

13. **When wife is not entitled to order for maintenance** [P. 1036, n. 30]—*Existence of decree for restitution*—Should the wife refuse to go and live with the husband, a decree for restitution of conjugal rights is a good answer to an application for maintenance under this section. A. I. R. 1931 Rang. 111 (1) = 133 I. C. 96 = 1931 Cr. C. 352. Under the Criminal Procedure Code it was not the intention of the Legislature that parties who wanted relief under Ch. XXXVI should ignore all decrees that may be passed by a Civil Court. It is immaterial whether a Civil Court decree for restitution of conjugal rights was passed *ex parte* or after contest. Where therefore the wife applies for maintenance under this section for the purpose of ignoring any decree that a Civil Court may pass in the suit by the husband for restitution of conjugal rights, no order under this section should be passed. A. I. R. 1932 A. 583 = 1932 A. L. J. 766 = L. R. 13 A. (Cr.) 145 = 1932 Cr. C. 701 = 141 I. C. 610 = 18 A. I. Cr. R. 309.

Loss of caste—whether sufficient to refuse maintenance [N. 30 (v)]—Where a young girl of fourteen, was excommunicated by a caste meeting because she had been raped by a man of a lower caste, the Court will be surrendering its discretion to the caste, if it were to refuse to award maintenance because she had been outcasted. A. I. R. 1933 B. 21 = 34 Bom. L. R. 1449 = 1933 Cr. C. 15 = 34 Cr. L. J. 140 = 141 I. C. 348.

14. **What is sufficient reason for refusal to live with the husband?**—When the breach between the husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to live separately and get maintenance. A. I. R. 1931 Lah. 561 (2) = 32 P. L. R. 619 = 1931 Cr. C. 849 = 32 Cr. L. J. 1251 = 134 I. C. 817.

15. **What is a proper offer to maintain?** [*P.* 1038, *n.* 34]—*It must be bonafide* [*N.* 34 (i)]—Where there is sufficient evidence that the wife has been ill-treated by her husband and that the husband's offer to take her back into his house is disingenuous and made only for the purpose of resisting her claim to maintenance, an order can properly be made under this section. *A. I. R.* 1932 Nag. 183 and *A. I. R.* 1933 Nag. 3 = 28 *N. L. R.* 234 = 1932 *Gr. C.* 906 = 141 *I. C.* 115 = 34 *Gr. L. J.* 123 = 19 *A. I. Gr. R.* 274; 1929 *A. L. J.* 1208; (1935) *M. W. N.* 476; *A. I. R.* 1929 *A.* 950 = *L. R.* 10 *A. (Cr.)* 153 = 31 *Gr. L. J.* 3 = 120 *I. C.* 195 = 13 *A. I. Gr. R.* 17 = 1929 *Gr. C.* 593. It is not necessary to prove habitual ill-treatment. *A. I. R.* 1935 Rang. 192. The Magistrate must however find that the offer was not *bonafide* or the reason given by the wife for not going back to the husband was sufficient. *A. I. R.* 1934 Lah. 946 = 36 *P. L. R.* 181 = 1934 *Cr. C.* 1334; *A. I. R.* 1930 Lah. 464 = 31 *P. L. R.* 664 = 130 *I. C.* 51 = 1930 *Gr. C.* 533.

Must the offer extend to observing conjugal duties? [*N.* 34 (iii)]—*S.* 488 has nothing to do with ordinary conjugal rights. It deals with "maintenance" only which includes nothing more than food, clothing and lodging. She cannot claim to be treated "as a wife." She can only claim to be maintained on a scale appropriate to her station in life. 56 *M.* 913.

SPECIAL RIGHTS OF MUHAMMADAN WIFE.

16. **Right of divorced wife to maintenance** [*P.* 1040, *n.* 44]—*A talak* when it becomes irrevocable puts an end to conjugal relationship and the divorced wife would not be entitled to claim maintenance from her husband beyond the period of *iddat* from the date of such divorce. *S.* 488 does not abrogate the personal law of the parties. 32 *Bom. L. R.* 582 = *A. I. R.* 1930 B. 178 = 31 *Gr. L. J.* 1110 = 126 *I. C.* 893; 5 *Luck.* 442.

17. **Non-payment of prompt dower not a sufficient ground for refusal to live with husband.**—Non-payment by the husband of prompt dower may be a good and sufficient reason under the Muhammadan law for a married woman to withhold her person from her husband but it does not follow that such non-payment is sufficient or good enough ground within the meaning of this section as to empower a Court to pass an order for maintenance to a Muhammadan wife against a husband who is willing to maintain her upon condition of her living with him. *S.* 488 cannot be affected by personal law and to claim protection of the Muhammadan law in derogation of the statutory provisions of the Code, is not permissible. *A. I. R.* 1935 Oudh 285 = 1935 *O. W. N.* 292 = 1935 *O. L. R.* 172 = 36 *Gr. L. J.* 524 = 154 *I. C.* 561.

VI.—RIGHT OF CHILDREN TO MAINTENANCE.

18. **Meaning of "child"** [*P.* 1040, *n.* 47]—In the absence of any statutory definition or anything to the contrary in the Act, the word "child" must be held to mean a person who is incompetent to enter into any contract or to enforce any claim under the law, *i.e.*, a person who is under the age of 18 according to the Indian Majority Act. 39 *C. W. N.* 432.

19. **Is offer to maintain the child if given over to the father sufficient ground for refusing order under this section?** [*P.* 1041, *n.* 49]—The child is not to be allowed to starve merely because the husband and wife do not live together. It is open to the father to apply for the custody of the child as provided by law. Meanwhile he is bound to maintain the child. 10 *Rang.* 486.

Father not relieved of liability when mother is of right entitled to custody as under the Muhammadan law [*N.* 49 (i)]—Courts can take notice of the fact that the mother under the Muhammadan law is the lawful guardian of the children and that the father is not *prima facie* entitled to demand their custody. An offer by a father to maintain the children provided they are entrusted to his custody in such circumstances is tantamount to a refusal to maintain them within the meaning of the section. 14 *Lah.* 770; *A. I. R.* 1930 Lah. 1043 = 32 *P. L. R.* 143 = 32 *Gr. L. J.* 247 = 129 *I. C.* 216 = 1930 *Gr. C.* 1219.

VII.—CONTENTS OF ORDER AWARDING MAINTENANCE.

20. **Rupees one hundred represent the maximum amount each person entitled to maintenance can get** [*P.* 1043, *n.* 56]—The words "in the whole" do not mean that Rs. 100 is the maximum limit for all the dependents together. It means "for all kinds of maintenance for each dependent." The words are intended to prevent the Court from exceeding the statutory limit in the case of any particular dependent and are not intended to restrict the powers of the Court to order Rs. 100 in respect of the maintenance of all the dependents. 37 *C. W. N.* 655 = *A. I. R.* 1933 C. 406 = 1933 *Gr. C.* 584 = 143 *I. C.* 286 = 24 *Gr. L. J.* 500.

21. **Payment of maintenance must be in coin** [*P. 1043, n. 60*].—The allowance to be made is in cash only and not in kind whether of grain or clothing or partly in cash and partly in kind. *A. I. R. 1932 Nag. 183* and *A. I. R. 1933 Nag. 3* = 28 *N. L. R. 284* = 1932 *Cr. C. 906* = 141 *I. C. 115* = 34 *Cr. L. J. 123* = 19 *A. I. Cr. R. 274*.

22. **Whether Magistrate can make order in terms of compromise** [*P. 1043, See n. 62*].—Where in a proceeding for maintenance under this section the parties enter into a compromise, the enforcement of the compromise comes within the jurisdiction of the Civil Court and not a Criminal Court. The Magistrate should in such a case refer the parties to the Civil Court and not incorporate the compromise in his order. *A. I. R. 1933 C. 776 (2)* = 37 *C. W. N. 736* = 1933 *Cr. C. 1327* = 147 *I. C. 914*. But *see* 59 *C. 1229* where it was held that anything short of a decree entitling the wife to maintenance, is not sufficient to take away the jurisdiction of the Magistrate. Merely because the parties agreed as to what was the proper rate of maintenance it does not mean that this section is no longer applicable; nor does it mean that it can no longer be said that the husband had neglected or refused to maintain his wife. 13 *Lah. 313*. If the compromise is entirely independent of the Court, the Court would be under no necessity to pass an order under s. 488 at all. But a compromise of which the essential part is the passing of an order under s. 488 is certainly enforceable. 60 *M. L. J. 213* = 33 *M. L. W. 405* = (1931) *M. W. N. 327* = *A. I. R. 1931 M. 185 (1)* = 4 *M. Cr. C. 101* = 32 *Cr. L. J. 688* = 131 *I. C. 173* = 1931 *Cr. C. 226*; 10 *O. W. N. 374* = *A. I. R. 1933 Oudh 119* = 34 *Cr. L. J. 744* = 144 *I. C. 51* = 1933 *Cr. C. 270*. If a husband and wife agree at once as to the rate of maintenance without adding conditions which cannot form part of the order, the Magistrate can pass an order in terms of the compromise. Where however, the compromise is with reference to other matters as well, not coming within the purview of this section, or where it amounts to an agreement to live separately by mutual consent, the compromise cannot be given effect to in a Criminal Court. *A. I. R. 1932 Lah. 349 (2)* = 33 *P. L. R. 292* = 1932 *Cr. C. 430* = 137 *I. C. 364* = 33 *Cr. L. J. 483* = 18 *A. I. Cr. R. 239*; *A. I. R. 1934 Lah. 864* = 36 *P. L. R. 153* = 152 *I. C. 946*; *A. I. R. 1935 A. 294*. A contrary view was taken in *A. I. R. 1933 C. 673* = 37 *C. W. N. 538* = 1933 *Cr. C. 1157*, where it was held that the order did not become illegal merely because it was based on a compromise one of the terms of which was that the wife should live separate from the husband. Where the order merely embodies an expression of wish by the husband that part of the money should be expended in sending the children to certain specified schools, but the maintenance awarded is scarcely sufficient for the bare necessities of the children, that portion of the order embodying the condition could not be held to have any binding effect. *A. I. R. 1933 Oudh 122* = 9 *O. W. N. 1189* = 34 *Cr. L. J. 238* = 141 *I. C. 805* = 1933 *Cr. C. 273*. An order containing a proviso that if the husband lives with the applicant who was the first wife, the latter would not be entitled to maintenance, makes the order vague and incapable of enforcement and therefore illegal. *A. I. R. 1929 Lah. 56* = 29 *Cr. L. J. 895* = 111 *I. C. 575*.

VIII.—PRACTICE AND PROCEDURE.

23. **Applicant need not be examined before process.**—An application for maintenance under this section is not a complaint and therefore it is not legally necessary for the applicant to be examined. *A. I. R. 1934 Lah. 946* = 36 *P. L. R. 181* = 1934 *Cr. C. 1334*.

24. **Sub-sec. (6). Evidence to be recorded as in Summons-cases.**—In applications under this section Magistrates are bound to record evidence in writing in the manner they record evidence in Summons-cases; ordinary Magistrates therefore under s. 355 and Presidency Magistrates under s. 362, their order on such applications not being appealable. But when the case cannot be finished at one hearing and the decision has to be put off for a considerable time, the Magistrate should in the exercise of his discretion make a note to enable him at the time of judgment to remember what evidence has been given. Similarly when he does not give judgment immediately after hearing the evidence, he should give reasons for his decision, to make it clear to the parties and to the High Court that his judgment is based on a proper consideration of the evidence. *A. I. R. 1931 B. 142* = 32 *Bom. L. R. 1499* = 129 *I. C. 339* = 32 *Cr. L. J. 276* = 1931 *Cr. C. 190*. But if the Magistrate does not choose to record the evidence as he is entitled to in non-appealable cases, the High Court cannot interfere with his discretion. *A. I. R. 1932 B. 179* = 34 *Bom. L. R. 276* = 33 *Cr. L. J. 461* = 137 *I. C. 27* = 1932 *Cr. C. 238* = 18 *A. I. Cr. R. 193*.

IX.—ENFORCEMENT OF ORDER FOR MAINTENANCE—SUB-SEC. (3).

25. **Third parties cannot be ordered to pay the maintenance.**—This section does not contemplate an order on a third party to pay the amount monthly out of certain income which may or may not be received on behalf of the defendant. *A. I. R. 1931 C. 644* = 35 *C. W. N. 692* = 1931 *Cr. C. 844* = 134 *I. C. 1199* = 33 *Cr. L. J. 93*.

26. When order for maintenance cannot be enforced [*P. 1046, n. 72*].—*Reunion between husband and wife*—Where the original order is conditional on neglect or refusal by the husband to maintain the wife, a *bonafide* reunion must be interpreted as removing the basis on which the order rests and as therefore vacating the order. 8 Rang. 460.

Sufficient cause [*N. 72 (vi)*].—The words “without sufficient cause” are very wide and seem to justify the raising of a plea that the order has become “spent” owing to the child for whom the maintenance was ordered having attained the age of majority and being able to maintain itself. 10 Rang. 194.

27. What are not proper reasons for refusing to enforce order [*P. 1047, n. 73*].—*That the original order was wrong*—Where for several years the wife had been collecting the maintenance through the Magisterial Courts, it is not open to a Magistrate to refuse relief to the wife on the ground that the original order was wrong. The original order stands until the husband is able to get it set aside or altered under s. 489 or sub-sec. (5) of this section. 13 Lah. 313.

That there has been a subsequent compromise between the parties—Where after the making of an order under this section, the parties entered into a compromise out of Court, but no order under this section was made in pursuance of that compromise, the Criminal Court cannot take cognizance of it and refuse to enforce the order. If the husband places his reliance upon the terms of the compromise, his remedy is in the Civil Court. A. I. R. 1932 Lah. 115 = 33 P. L. R. 927 = 135 I. C. 198 = 1932 Cr. C. 135 = 33 Cr. L. J. 121 = 17 A. I. Cr. R. 269.

28. Defaulter cannot be imprisoned a second time for the same arrears.—A defaulter cannot be sentenced a second time to imprisonment for a default for which he has already undergone a sentence of imprisonment. Such a sentence is entirely at variance with the principles of criminal law and cannot be upheld. 10 Rang. 176.

29. Dismissal of application to execute the order is no bar to order allowing subsequent application.—An order refusing to enforce the maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period. 11 Rang. 226 (F. B.)

30. When application should be made—Scope of the second proviso to sub-sec. (3).—The second proviso to sub-sec. (3) was enacted to prevent the person in whose favour the order was made, from being negligent and allowing arrears to pile up. It was not meant that a loophole should be given to the person ordered to pay maintenance to evade payment by preventing the service of process on him. Where therefore notice of the first application for enforcement of arrears could not be served, as the husband could not be found, a second application for subsequent arrears inclusive of that claimed in the first application was not barred even though the total amount claimed was for a period exceeding one year. 13 Rang. 289.

X.—CANCELLATION OF ORDER AWARDING MAINTENANCE.

31. Cancellation of order in favour of wife on proof of her living in adultery [*P. 1048, n. 81*].—Where the order for maintenance in favour of the wife is cancelled on proof of her living in adultery, the order could not be given a retrospective effect. She is entitled to the arrears of maintenance due to her before the order under sub-sec. (4). A. I. R. 1930 Lah. 99 (1) = 30 Cr. L. J. 719 = 117 I. C. 67 = 1930 Cr. C. 96.

SECTION 489.

Notes.—1. Scope of the section.—The provisions of this section are comprehensive and empower a Magistrate to vary the amount fixed under s. 488 not only by himself but by his predecessor in office; and more so to vary his own order though it has been corrected in revision by the High Court. He will not thereby be reviewing or interfering with the order of the High Court but will be dealing with the changed circumstances. A. I. R. 1932 Sind 59 = 1932 Cr. C. 200 = 138 I. C. 624 = 33 Cr. L. J. 646. When the husband has subsequently obtained a decree for restitution of conjugal rights it is open to the Magistrate to revise his order on the husband's application even though the order for maintenance might have been passed by the High Court. A. I. R. 1934 Rang. 39 = 35 Cr. L. J. 813 = 148 I. C. 908 = 1934 Cr. C. 262.

2. Reduction in rate—Such order operates only prospectively [*P. 1050, n. 3*].—An order reducing the rate of maintenance retrospectively is improper. A. I. R. 1935 Lah. 24 = 1935 Cr. C. 18.

SECTION 490.

Note.—Competency of Second-class Magistrate to enforce order duly made [*P.* 1051, *n.* 4].—A Second-class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under s. 488. Even assuming that the words “any Magistrate” in this section have not been used with reference to the class of Magistrates referred to in ss. 488 and 489, the power to enforce an order of maintenance does not necessarily include the power to sentence the person against whom it was passed, to imprisonment. 41 *M. L. W.* 697 = 68 *M. L. J.* 493 = (1934) *M. W. N.* 922.

CHAPTER XXXVII.

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

SECTION 491.

Notes.—1. Scope of the section.—The procedure by way of Habeas Corpus should not be utilised for the purpose of going behind an order of a competent Court declaring a person to be a fit and proper person to exercise guardianship over an infant. It is only in cases where it can be shown that a minor child is illegally or improperly detained, that the Courts will interfere by way of Habeas Corpus. 54 *M.* 759. What a Court has to look to is the interest of the child as being paramount. *A. I. R.* 1929 *M.* 33 = 2 *M. Cr. C.* 58 (F. B.) It is not proper that questions involving status, *e.g.*, whether a person has become a convert and was legally married, etc., should be summarily decided in an application under this section. 35 *P. L. R.* 594 = *A. I. R.* 1934 *Lah.* 647 = 35 *Cr. L. J.* 1397 = 151 *I. C.* 692 = 1934 *Cr. C.* 979. The fact that other remedies are available is no bar to granting relief under this section if the provisions of the section are satisfied. *A. I. R.* 1934 *Oudh* 392 = 11 *O. W. N.* 803 = 35 *Cr. L. J.* 1108 = 150 *I. C.* 706 = 1934 *O. L. R.* 602 = 1934 *Cr. C.* 1203. Thus the remedy under s. 491 is open to the husband to apply for the handing over to him of his minor wife, though it is open to the husband to proceed under the Guardian and Wards Act. 53 *M.* 72. But where a remedy under the Guardian and Wards Act is more suitable, the High Court should not use its powers under this section. 1934 *A. L. J.* 946 = *A. I. R.* 1935 *A.* 55 = 154 *I. C.* 638 = 1935 *Cr. C.* 36; 52 *A.* 491; *A. I. R.* 1929 *M.* 33 = 2 *M. Cr. C.* 58 (F. B.)

The provisions of this section are wide enough to enable the High Court to give relief even in cases where persons are sentenced by Military Courts or Tribunals acting under Martial Law Regulations. 55 *B.* 263 (F. B.)

2. Are the High Courts still entitled to issue Writ of “Habeas Corpus”? [*P.* 1053, *n.* 3].—In 61 *C.* 197 it was held that in India the Writ of Habeas Corpus has been displaced by s. 491 of the Cr. P. C. and in so far as it displaces the Writ, is not *ultra vires*.

3. Sub-section (1) (b). What is meant by “improperly.”—The expression “improperly” cannot include any consideration of the question whether the legislation under which the person is detained is proper, for it is beyond the province of a Court to consider any such matter. The word can only refer to cases in which although the forms of law have been observed there has been a fraud on an Act or an abuse of the powers given by the Legislature. 60 *C.* 364. Even if a minor Hindu wife does consent and remain in the custody of those who are charged with illegally detaining her, that does not matter, but the persons who keep her, even with her consent, are to be held to have illegally detained her if the husband who is better entitled in law to have the custody of that person, desires to have that custody. 53 *M.* 72. Where a prisoner was released temporarily to enable him to be at the bedside of his sick wife, his subsequent detention in prison cannot be said to be improper. The temporary release of the prisoner does not amount to a remission of the unexpired portion of the sentence. *A. I. R.* 1935 *A.* 181 = 153 *I. C.* 351 = 1935 *Cr. C.* 226.

4. Scope of sub-section (1) (b) [*P.* 1053, *n.* 4].—The words “detained” and “custody” imply some sort of confinement or physical restraint on the liberty of movement of the detenu. Where a person is allowed to enjoy the fullest liberty of movement but the only restriction imposed on his rights is that persons coming to see him could do so after getting permission from another authority, sub-sec. (1) (b) has no application. *A. I. R.* 1934 *Oudh* 301 = 11 *O. W. N.* 799 = 1934 *O. L. R.* 568 = 35 *Cr. L. J.* 1052 = 149 *I. C.* 991 = 1934 *Cr. C.* 839.

5. Appeal [*P.* 1054, *n.* 7 (iv)].—The Allahabad High Court has held that an order under s. 491 is an order made in the exercise of criminal jurisdiction and that therefore an appeal does not lie against such an order under cl. 10 of its Letters Patent. 56 *A.* 899.

6. Costs.—The High Court has no jurisdiction to award costs in applications under this section. 55 M. 1049 (F.B.)

7. Whether successive applications can be made under this section.—Under the Common Law of England an applicant for a Writ of Habeas Corpus has a right to apply successively to every Court and to each Judge of the High Court who is bound to hear and determine the application. But the High Courts in India do not exercise the Common Law right of issuing the Writ but do so by virtue of the statutory power conferred on them. When there is a general rule of the High Court barring a second application to the same effect, it applies equally to applications for a Writ of Habeas Corpus and a second application cannot therefore be entertained. 56 A. 271.

8. Power of High Court to issue order under this section when person detained under warrant issued under Extradition Act, 1903 [P. 1055, n. 9]—This section gives jurisdiction to the High Court to interfere in case of an arrest under a warrant issued by the Political Agent under s. 7, Extradition Act, 1903. The mere fact that after the arrest the person was temporarily released on bail pending further inquiry, does not oust the jurisdiction of the High Court under this section. The power of the Court to interfere under s. 491, Cr. P. C. is not a power created by the Extradition Act or exercisable by way of revision. 56 A. 409.

CHAPTER XXXVIII.

OF THE PUBLIC PROSECUTOR.

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SECTION 494.

Notes.—1. Existence of *prima facie* case does not prevent Magistrate from permitting withdrawal.—It is competent for a Magistrate to allow the withdrawal of a case even though he has previously issued process on the ground that a *prima facie* case exists. A *prima facie* case only means that there is ground for proceeding. It is not the same thing as “proof.” Even if the Magistrate should start with the belief that the prosecution case is true, still in a suitable case he may give his consent to the Public Prosecutor to withdraw from the prosecution if he finds that there are good grounds for doing so. Consent is not to be given as a matter of course, nor is it to be unreasonably withheld. A *nolle prosequi* is usually granted where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence, or if it is clear that an indictment is not sustainable against the defendant. See Archibald's Criminal Pleadings, 28th Edition, p. 127. 59 C. 275.

2. District Magistrate not to interfere with discretion of Public Prosecutor.—This section does not recognise the authority of the District Magistrate to interfere with the discretion either of the Public Prosecutor or of the Court. There is also good reason for it. As a superior Court he may have judicially to deal with an order passed by the Magistrate under this section. Moreover, if the Public Prosecutor applies to withdraw, acting under the instructions of the District Magistrate, it may embarrass the trying Magistrate in bringing his judicial mind to bear on the prayer to withdraw. A. I. R. 1932 Lah. 611 = 33 P. L. R. 793 = 140 I. C. 25 = 1932 Cr. C. 917 = 33 Cr. L. J. 912.

3. Appearance by Public Prosecutor only for withdrawal—procedure whether correct.—Where the Public Prosecutor had not been in charge of the case before, but entered appearance simply for the purpose of withdrawal, it was held by *Ghose, J.* that the application was not regular because he had not been in charge of the case before and it was open to objection because he appeared in the case to withdraw the prosecution, but it did not amount to an illegality. *Lort-Williams, J.* however held that it was neither illegal nor irregular but only unusual. 59 C. 275.

4. At what stage withdrawal should be permitted.—Clauses (1) and (2) together exhaust the whole range of cases conceivable; cl. (1) putting into one category only those cases in which a jury trial is in fact being held and all other cases being put into a different category, namely, cl. (2). This is only for the purpose of providing for the extreme limit or the ultimate point of time till when the withdrawal can be made. When the accused has been committed to the Court but a jury trial has not begun, the case is not within cl. (1) and

so is within cl. (2). In such a case withdrawal can be permitted until judgment is pronounced. If the accused pleads guilty, the order of conviction on such plea can be regarded as a judgment. If the trial by jury has actually begun, clause (1) will apply. There is therefore no want of jurisdiction or illegality in allowing withdrawal after commitment but before the charge being read out and the accused called upon to plead. 60 C. 233.

5. What amounts to withdrawal.—Where the Public Prosecutor merely stated that he wanted to prosecute the accused under certain sections but that there was no case under s. 218, I. P. C. he only gave his opinion that the evidence would not show a case under that section, and there was no withdrawal by the Public Prosecutor under s. 494 in respect of the offence under that section. Moreover a withdrawal at the beginning would only result in a discharge and not an acquittal. A. I. R. 1935 A. 366 = 1935 A. L. J. 653.

6. Practice—Reasons for withdrawal of charge [P. 1058, n. 4]—This section does not intend to limit the materials on which action may be taken, to matters appearing on the record only. On the other hand, the section contemplates more often than not, upon circumstances extraneous to the record, inexpediency of prosecution for reasons of state, public policy, etc. 60 C. 233. There need be no formal inquiry about the reasons for the withdrawal. If there should be a formal inquiry to decide the matter which in the opinion of the proper authorities should not be dragged into Court, it would defeat the purpose of the section. The section does not require the Magistrate to record the reasons, though it is desirable to have some material on record. A. I. R. 1932 Sind 92 = 26 S. L. R. 67 = 137 I. C. 344 = 33 Cr. L. J. 449 = 1932 Cr. C. 532 = 18 A. I. Cr. R. 198; A. I. R. 1930 Sind 156 = 1930 Cr. C. 620 = 31 Cr. L. J. 684 = 124 I. C. 378 = 24 S. L. R. 377; A. I. R. 1932 Lah. 368 = 136 I. C. 714 = 33 P. L. R. 394 = 33 Cr. L. J. 337 = 17 A. I. Cr. R. 410 = 1932 Cr. C. 486; A. I. R. 1933 Sind 357 = 35 Cr. L. J. 142 = 146 I. C. 542 = 1933 Cr. C. 1340. But in A. I. R. 1933 Nag. 78 = 29 N. L. R. 201 = 34 Cr. L. J. 519 = 143 I. C. 77 = 1933 Cr. C. 315 it was held that an order under this section being a judicial order, must be passed like any other considered order and the Magistrate was bound to give his reasons.

7. Accused against whom charges withdrawn competent witness against co-accused [P. 1058, n. 8]—The Magistrate is within his discretion in permitting the Public Prosecutor to withdraw from the prosecution of one of the accused in order that his evidence might be available against the other accused who was being tried jointly with him. A. I. R. 1933 C. 148 = 1933 Cr. C. 225 = 144 I. C. 74 = 34 Cr. L. J. 675.

8. Discharge under this section does not bar a fresh complaint. See note 17 to s. 403.

SECTION 495.

Notes.—1. Magistrate should exercise his discretion in authorising “any person” to conduct the prosecution [P. 1060, See n. 2]—The provisions of sub-section (1) are no doubt wide enough so as to empower a trying Magistrate to permit “any person” to conduct the prosecution, but that does not mean that he should grant such permission indiscriminately. He has to exercise his discretion after considering all the circumstances of the case. A. I. R. 1933 Sind 345 = 27 S. L. R. 331 = 147 I. C. 131 = 1933 Cr. C. 1121. The Magistrate should exercise the discretion himself and not refer the matter to a higher authority. A. I. R. 1935 Sind 3 = 1935 Cr. C. 44.

2. Sub-section (4). “Officer of Police.”—Excise Officers are not included in the expression “officer of Police” in this sub-section. An Abkari Inspector is therefore competent to conduct the prosecution. 57 B. 441.

CHAPTER XXXIX.

OF BAIL.

SECTION 496.

Note.—General nature of the right to be admitted to bail [P. 1061, n. 2]—It is well settled that bail will not be withheld merely as a punishment, and that the requirements as to bail are merely to secure the attendance of an accused person at the trial. In granting or refusing bail, Courts generally take into consideration the following points: (1) the nature of the accusation; (2) the nature of the evidence in support of the accusation; (3) the severity of the punishment which conviction will entail, and (4) whether the accused, if released on bail, is likely (a) to tamper with the prosecution evidence or (b) to get up false evidence in support of the defence. A. I. R. 1933 Sind 367 = 35 Cr. L. J. 144 = 146 I. C. 561 = 1933 Cr. C. 1332.

SECTION 497.

Notes.—1. General rule in non-bailable cases [P. 1063, n. 2]—Save in exceptional cases persons accused of crimes punishable with long terms of imprisonment should not be released by Magistrates and Sessions Judges on bail. The richer the accused and the more easy it is for him to find bail, the less it is desirable that he should be released and in no circumstances whatever, without an order of the High Court, should any persons accused of murder be allowed bail. In England a person charged with murder is never in any circumstances released on bail and the opportunities in India for the corruption of witnesses are so great, that the risks involved cannot be exaggerated. 11 Pat. 280. See also A. I. R. 1934 Sind 131 = 28 S. L. R. 47 = 1934 Cr. C. 1067.

2. When bail should be granted.—To refuse bail it is not necessary that there should be evidence which would practically justify a conviction. The accused is not entitled to be released if there appear reasonable grounds for believing that he has been guilty of an offence of the specified kind. If the application is made at an early stage, the prosecution should satisfy the Court that they will be able to produce good *prima facie* evidence in support of the charge. At that stage it is not possible to have evidence establishing the guilt of the accused beyond reasonable doubt. A. I. R. 1933 B. 492 = 35 Bom. L. R. 1072 = 1933 Cr. C. 1596.

3. Revision of bail order by High Court [P. 1064, n. 7]—It is well settled that the High Court will not lightly interfere with the exercise of discretion vested in the lower Court. Where the Sessions Judge refused bail after taking into consideration all the circumstances of the case, the High Court will not interfere with his order. A. I. R. 1933 Sind 367 = 35 Cr. L. J. 144 = 146 I. C. 561 = 1933 Cr. C. 1339.

4. Sub-section (5).—The words “by itself” mean by the Magistrate himself who commits the accused to custody. It does not include any other Magistrate of the same class. A. I. R. 1933 Sind 331 (2) = 27 S. L. R. 197 = 1933 Cr. C. 1078. In the case of an accused who was released by the police, the Magistrate has no power under sub-section (5) to commit him to custody, *ibid.*

SECTION 498.

Notes.—1. The power conferred by s. 498 is unfettered [P. 1065, See n. 1]—The High Court's powers to grant bail conferred on it by s. 498 is entirely unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, *viz.*, that the discretion must be exercised judicially. The discretion of the High Court or Court of Session is not limited to the consideration set out in s. 497, but that consideration is only material to be considered along with all the circumstances of the case. 53 A. 931; 54 A. 115; 15 Lah. 39; 35 Bom. L. R. 1072 = A. I. R. 1933 B. 492 = 1933 Cr. C. 1596; A. I. R. 1934 Sind 131 = 28 S. L. R. 47 = 1934 Cr. C. 1067.

2. Principles which should guide the High Court in granting or refusing bail [P. 1055, n. 2]—The principles to be deduced from ss. 496 and 497 is that grant of bail is the rule and refusal is the exception. An accused person is presumed under the law to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to freedom and every opportunity to look after his own case. It goes without saying that an accused person, if he enjoys freedom, will be in a much better position to look after his case and to properly defend himself than if he were in custody. 53 A. 931. But with reference to the above observation of *Mukerji, J.* in 53 A. 931 that the grant of bail should be the rule and the refusal of bail should be the exception, a Special Bench of the same Court observed that they did not think that any such rule exists as regards serious non-bailable offences which are punishable with death or transportation for life. In cases where there is reasonable ground for believing that the accused is guilty of such an offence, the grant of bail by a Sessions Judge or the High Court is to be made not as a general rule but only in exceptional cases. This is particularly so when the accused is on his trial, the prosecution evidence is closed and the Sessions Judge has refused bail. 54 A. 115 (F. B.) When it was represented that the accused was required to instruct his Counsel, that members of two parties were being prosecuted and that a member of the other party was released on bail, thereby giving the other party a better chance of their case being properly represented in Court, these reasons must weigh with the Court, and even though the accused was charged with an offence under s. 304, I. P. C. the accused should be released on bail if there was no chance of his absconding. 51 A. 603. Where it is obvious that the trial must be a very protracted and complicated one, that in itself would be a circumstance justifying the grant of bail. A. I. R. 1933 B. 492 = 35 Bom. L. R. 1072 = 1933 Cr. C. 1596.

3. Appellate Court can grant bail in cases under Chap. VIII.—This section is in the very widest terms and authority is clearly given to an appellate Court, to the High Court or Court of Session, in any case to direct that any person be admitted to bail. It is difficult to construe this section in any other manner. The appellate Court has therefore power to grant bail in a case where an order has been made under s. 107. **54 A. 861.**

4. High Court's power to cancel bail.—The High Court is not specifically empowered by this section to cancel bail granted by itself; but it can hardly be argued that it would be exercising the wide powers with which it is endowed by s. 561-A improperly if it follows the procedure that would be observed by a Sessions Judge or Magistrate and directs the arrest of a person who has been released on bail under its orders, for the reason that there do now appear to be reasonable grounds for believing that he has committed a non-bailable offence. **A. I. R. 1932 A. 534 = 1932 A. L. J. 701 = 138 I. C. 768 = 1932 Cr. C. 630 = 33 Cr. L. J. 684 = 18 A. I. Cr. R. 306 = L. R. 13 A. (Cr.) 142; 33 Cr. L. J. 335 = 136 I. C. 709 = 1932 Cr. C. 579 = 33 P. L. R. 387 = A. I. R. 1932 Lah. 433.**

SECTION 499.

Note.—Bond from surety alone not illegal.—The surety cannot escape liability on the ground that there should have been a bond executed by the accused also. The two bonds contain different undertakings and are not co-related. The validity of the one does not depend on the validity of the other. **A. I. R. 1934 A. 1046 = 4 A. W. R. 778 = 1934 A. L. R. 1116 = 153 I. C. 155 = 1934 Cr. C. 1329.**

SECTION 501.

Note.—District Magistrate cannot cancel bail when case is not pending before him.—Where the accused who were charged with bailable offences, were released on bail by the City Magistrate before whom the case was pending, it was not open to the District Magistrate who had no seisin of the case, to cancel the bail. His action was without jurisdiction and in disregard of the law which did not empower even the trying Magistrate to cancel the bail in a case where the accused were as a matter of right entitled to bail. The utmost which the Court before which the case was pending could do was to enhance the bail. **A. I. R. 1932 A. 327 = 1932 Cr. C. 306 = L. R. 13 A. (Cr.) 100 = 18 A. I. Cr. R. 93 = 139 I. C. 330 = 33 Cr. L. J. 752.**

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

SECTION 503.

Notes.—1. Power to issue commission to examine witnesses in criminal cases to be sparingly used.—In a criminal prosecution above all, the witnesses should be examined in open Court, giving an opportunity for the accused to examine them and it is only in the circumstances stated in ss. 503 and 506 that an order for the issue of a commission could be made. The mere fact that the witness is temporarily ill is no ground for issuing a commission. Ss. 503 and 506 should be used sparingly and only in the clearest possible case. **A. I. R. 1932 Pat. 242 = 13 P. L. T. 345 = 1932 Cr. C. 639 = 33 Cr. L. J. 942 = 140 I. C. 291.**

2. Ruling Prince of Indian State cannot be examined on commission.—A Criminal Court in British India has no jurisdiction to issue a commission to an officer representing the British Indian Government resident in the territory of an Indian State for the purpose of examining the Ruling Prince of that State, as such Ruling Prince is not amenable to the jurisdiction of the British Courts. **A. I. R. 1933 Nag. 226 = 16 N. L. J. 170 = 29 N. L. R. 315 = 34 Cr. L. J. 797 = 144 I. C. 510 = 1933 Cr. C. 807.**

3. Section 503 applies to issue of commission only in cases pending before Courts therein specified [*P. 1070, n. 2*].—If the proceedings are pending in the Court of any Magistrate not being one of those specified in this section, the procedure to be followed is that provided in s. 506, *viz.*, to apply to the District Magistrate stating the reasons for the application. Where a case was pending in the Court of the Bench Magistrates and the Sessions Judge on an application by the complainant ordered the issue of a commission, the order was unsustainable. *A. I. R. 1933 Sind 278 = 35 Cr. L. J. 22 = 146 I. C. 203 = 1933 Cr. C. 952.*

SECTION 507.

Note.—Accused may apply after charge is framed for reissue of Commission to cross-examine witness—Section 256, gives an accused person the right to have the witnesses for the prosecution cross-examined after the charge is framed and that right is not in any way affected by the provisions of Ch. XL. S. 507 provides for the inspection of depositions taken on commission and it is open to a person accused in a warrant case to refrain from putting in any interrogatories when the commission is first issued and apply at a later stage, that is after inspection of the deposition taken on commission and after charge has been framed against him, for re-issue of the commission together with his cross-interrogatories. *61 C. 824.*

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

SECTION 509.

Note.—Deposition must be taken and attested in accused's presence [*P. 1076, n. 3*].—The section does not expressly require any certificate by the Magistrate in any particular form; the requirements of the law would be complied with if it appears or is made to appear that the statement was taken and signed by the Magistrate in the presence of the accused. *A. I. R. 1933 Lah. 131 = 34 Cr. L. J. 443 = 142 I. C. 377 = 1933 Cr. C. 247.*

SECTION 510.

Note.—Evidentiary value of Chemical Examiner's Report.—The written report of the Chemical Examiner may be used as evidence. But in practice the signatures on reports are not proved. The Chemical Examiners are never called. No person ought to be put in peril of capital, or any punishment on a written report not given on oath and untested by cross-examination. To accept such a report as proof of death by poisoning or of anything, is an impossible proposition in law. *56 A. 228.* But the Chemical Examiner need not be called in all cases in which a Chemical analysis has been made and in which the result of such analysis is a determining factor in the case. Where neither the accused nor his Counsel objected to the admission of the report and they did not request that the Chemical Examiners should be examined nor did they plead that the article found was not in fact what it was reported to be, the mere omission to call the Chemical Examiner as a witness did not vitiate the trial. *A. I. R. 1934 A. 873 = 1935 A. L. R. 19 = L. R. 15 A. (Cr.) 110 = 153 I. C. 472 = 1934 Cr. C. 1082 = 21 A. I. Cr. R. 209.* S. 510 embodies a rule of evidence and allows the Court discretion to admit the report in evidence without requiring the officer concerned to be examined. But if the Court finds the report to be inadequate it should not admit it in evidence unless the officer concerned submits a full and satisfactory report or has been examined in support of it. *A. I. R. 1934 Oudh 62 = 11 O. W. N. 312 = 1934 O. L. R. 341 = 35 Cr. L. J. 700 = 148 I. C. 600 = 1934 Cr. C. 231.* The intention of the Legislature is that the reports should have the same value as they would have if they were formally proved by oral testimony. It is always open to the Courts to call the Chemical Examiner when the interests of justice require him to be called. *15 Lah. 310.*

SECTION 511.

Note.—Previous convictions must be proved.—All previous convictions must be proved in accordance with law. A mere admission of the accused is not sufficient especially when there is nothing on the record to justify the questioning of the accused under s. 342 on that point. *A. I. R. 1934 Lah. 693 = 35 P. L. R. 697 = 1934 Cr. C. 1908.*

SECTION 514.

Notes.—1. Who can determine forfeiture of bond [*P. 1083, n. 5*].—According to the provisions of this section it is only the Court which had taken the bond that could enforce it. *A. I. R. 1933 Lah. 678 (1) = 145 I. C. 270 = 34 Cr. L. J. 952.*

PRACTICE.

2. Sufficient evidence must be recorded before issuing notice to show cause [*P. 1083, n. 7*].—It is the duty of the Magistrate to record evidence and come to a definite finding that the bond has been forfeited before a notice is issued upon the bailor to show cause why the penalty should not be realised from him. *A. I. R. 1929 Pat. 643 = 1929 Cr. C. 371.*

BREACH AND FORFEITURE.

3. Bond must be construed strictly [*F. 1085, n. 15*].—A bond imposing a penalty must always be construed strictly. Where the only obligation in the bond was to appear on a certain date, failure to appear on the adjourned dates works no forfeiture. *56 B. 220.* In the absence of express provision in the bond itself, the obligation to produce the accused, ceases to exist on the transfer of the case to another Magistrate and the bond is not revived on a subsequent re-transfer. *37 C. W. N. 880 = A. I. R. 1934 C. 101 = 35 Cr. L. J. 532 = 147 I. C. 1041 = 1934 Cr. C. 145; A. I. R. 1934 Sind 152 = 152 I. C. 874 = 1934 Cr. C. 1144.* Where the surety undertook to produce the accused on certain dates at a certain place, the bond cannot be forfeited by reason of his failure to produce the accused on a different date at a different place. *A. I. R. 1934 C. 763 = 38 C. W. N. 804 = 36 Cr. L. J. 76 = 152 I. C. 341 = 1934 Cr. C. 1188.* But where the surety undertook to produce the accused on "every day till the disposal of the case" it was held that a transfer of the case to another Magistrate did not relieve the surety of his obligation. *38 C. W. N. 852 = A. I. R. 1934 C. 785 = 36 Cr. L. J. 133 = 152 I. C. 846 = 1934 Cr. C. 1207.*

4. Temporary arrest of accused does not discharge sureties.—Where the sureties undertook to produce the accused on a certain date, and a week before that date the accused was arrested on another charge but he escaped the next day and disappeared, it was held that the sureties forfeited their bond. If the accused had been in jail after the arrest, the sureties would by an act of law, have been unable to implement their obligation but the mere fact of arrest would not be inconsistent with the custody of the sureties. The important point is not mere arrest but confinement under arrest. *A. I. R. 1931 Pat. 19 = 12 P. L. T. 814 = 1931 Cr. C. 55 = 130 I. C. 161 = 32 Cr. L. J. 467.*

5. Are both principal and surety liable to pay on forfeiture of bond? [*P. 1088, n. 22*].—The recovery from the accused, of the amount forfeited by him under his bond does not relieve the surety of his liability to make good such part of his bond as he has been ordered by the Court to pay. The principle laid down in s. 128, Contract Act has no application. The accused is not the principal debtor and the bond of the surety is not to make good any amount due by the accused in the event of his failure to do so, but to pay a certain amount in the event of the failure of the accused to attend the Court. *A. I. R. 1933 Sind 320 = 147 I. C. 127 = 1933 Cr. C. 1074.*

6. Order for imprisonment cannot be made before attachment and sale of property [*P. 1089, n. 23*].—The Court should in the first instance proceed to recover the amount by issuing a Warrant for the attachment and sale of the movable property belonging to the surety and when this has proved infructuous, an order at a subsequent stage might be passed for the imprisonment of the surety. An order cannot be made immediately that he should be imprisoned in default of payment of the amount. *A. I. R. 1934 A. 1046 = 4 A. W. R. 778 = 1934 A. L. R. 1116 = 153 I. C. 155 = 1934 Cr. C. 1329.*

7. Sub-section (5).—This sub-section gives a discretion to the Court to remit any portion of the penalty mentioned in the bond and enforce payment in part only. Such remission may be granted (a) where the accused has been subsequently arrested and the amount forfeited was excessive and the surety was unable to pay and (b) where the surety did not act irresponsibly and there had been no connivance or negligence on his part. *A. I. R. 1935 C. 246.*

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

SECTIONS 516-A AND 517.

Notes.—1. Scope of the sections—S. 516-A deals with property appearing to have been used for the commission of any offence or property regarding which any offence appears to have been committed. In such a case the Court may make an order for the custody of the property pending the conclusion of the inquiry or trial, the reason being that in some cases it becomes necessary to preserve the property either as evidence or in order to make a proper order under s. 517 after the criminal case has come to an end. But if there is no further prospect of any further attempt to prove that the accused had stolen the property or committed any offence with reference to it, the proper order to make is to hand over the property to the person with whom it had been at the beginning. **A. I. R. 1931 C. 455 = 35 C. W. N. 198 = 1931 Cr. C. 607 = 132 I. C. 902 = 32 Cr. L. J. 983.** No order under these sections can be passed in respect of property which was neither produced before the Court nor was in its custody. (1934) **M. W. N. 566.**

IN RESPECT OF WHAT PROPERTY OR DOCUMENT ORDER MAY BE MADE.

2. Disposal of property found in accused's possession as to which no offence is committed [*P. 1092, n. 5*].—Where a certain sum of money was found on the person of the accused when he was searched under s. 51, the Court has power to impose a fine and direct that the fine be recovered by confiscation of the money in Court. **36 Bom. L. R. 324 = A. I. R. 1934 B. 193 = 35 Cr. L. J. 1344 = 151 I. C. 472 = 1934 Cr. C. 707.**

3. Property used for the commission of an offence [*P. 1092, See n. 6*].—Where the accused is charged under s. 338, I. P. C. (causing grievous hurt by an act which endangers human life, etc.) it would be straining the language to hold that the motor car used by the accused was used for the commission of the offence within the meaning of this section. **A. I. R. 1931 Lah. 565 = 1931 Cr. C. 853.** Where the accused was convicted of criminal breach of trust in respect of certain Government promissory notes and it was found that the notes which formed the subject of prosecution had before the conviction of the accused been renewed at the instance of a Bank and the renewed notes were in circulation, no order can be made under this section in respect of the renewed notes as no offence was committed in relation to them nor were they used for the commission of any offence. **33 Cr. L. J. 569 = 138 I. C. 156 = 1932 Cr. C. 521 = 9 O. W. N. 434 = A. I. R. 1932 Oudh 218.**

4. Disposal of stolen property.—In cases regarding the disposal of stolen property by a Court, the Government cannot lay any claim to such property so long as there is anyone entitled to the possession thereof. **A. I. R. 1934 Lah. 247 = 34 Cr. L. J. 581 = 143 I. C. 358 = 1934 Cr. C. 468.**

WHAT ORDERS MAY BE MADE.

5. Meaning of "or otherwise."—The words "or otherwise" must be read as *ejusdem generis* to the methods of disposal previously enumerated and do not confer upon the Court a general power to make any order for disposal which it may deem fit. **36 Bom. L. R. 324 = A. I. R. 1934 B. 193 = 35 Cr. L. J. 1344 = 151 I. C. 472 = 1934 Cr. C. 707.**

6. Proper order when original of the property has been used up or converted [*See P. 1093, n. 8*].—Even though some of the property might have been used up or sold to others, if it is possible to get any idea as to the value the property actually fetched at their sale or if any specific amount of money could be seized as representing such sale proceeds, it is open to the Criminal Court to compel the parties to produce such properties as may be capable of production and also to produce the money equivalent of such properties as may be incapable of production. **A. I. R. 1934 C. 454 = 35 Cr. L. J. 886 = 149 I. C. 36 = 1934 Cr. C. 620.**

7. Generally in cases of acquittal property should be restored to the person from whom it is taken [*P. 1096, n. 13 (ii)*].—The simple rule should be that if no crime is made out, the Magistrate should return the property to the party from whom it is taken unless there are special circumstances which would render such a course unjustifiable. The mere fact that two parties are quarrelling about possession is not one of the special circumstances which would take a case out of the general rule. **59 M. L. J. 901 = (1930) M. W. N. 1106 = A. I. R. 1931 M. 17 = 32 Cr. L. J. 355 = 129 I. C. 458 = 1931 Cr. C. 30 = 15 A. I. Cr. R. 434; (1932) M. W. N. 813 = A. I. R. 1932 M. 495 = 5 M. Cr. C. 163 = 33 Cr. L. J. 783 = 139 I. C. 340 = 1932 Cr. C. 470; 56 M. 654.**

8. In special cases Magistrate may order property to be delivered to a person other than the one in whose possession it was found [*P.* 1096, n. 13 (iii)]—When property has been pledged by the accused and recovered by the police from the pledgee, and the accused was convicted, it is open to the Magistrate to order the delivery of the property to the complainant if he finds that the pledge was not *bonafide*. The validity of the pledge should be determined with reference to s. 178, Contract Act, as to the good faith, etc., of the parties. 12 Lah. 304.

POWERS OF APPELLATE AND REVISIONAL COURTS.

9. Order under s. 517 open to appeal or revision.—An order passed by a Magistrate under s. 517 is a judicial order and is open to review by the higher Courts on appeal or revision as the case may be. A. I. R. 1931 Lah. 527 = 132 I. C. 202 = 32 Cr. L. J. 347 = 1931 Cr. C. 751 = 16 A. I. Cr. R. 461.

SECTION 520.

Note.—Court of confirmation, appeal, reference or revision.—What this section means is that any Court which has powers of appeal, confirmation, reference or revision in respect of the trial Court, that being the Subordinate Court thereto, referred to in the section, can make any substantive order it thinks fit in respect of property dealt with by the trial Court under ss. 517, 518 or 519. 55 B. 369 (F. B.) following 7 Rang. 345 (F. B.) and over-ruling 42 B. 664 where it was held that the Court referred to in this section was the Court to which an appeal or application for confirmation or reference or revision might be made in respect of the main charge.

SECTION 522.

CONDITIONS PRECEDENT FOR ACTING UNDER THIS SECTION.

Notes.—1. Conviction of all the accused not necessary.—There is no reason for putting a narrow construction on s. 522. A conviction is undoubtedly necessary under this section but not necessarily the conviction of all the accused. 55 B. 155.

2. Offence of which accused is convicted must be attended by criminal force [*P.* 1104, n. 3]—Where the offence was not attended by criminal force or show of criminal force or by any criminal intimidation, nor was there any evidence to show that by such force or show of force or criminal intimidation the complainant had been dispossessed of immovable property and the accused was also acquitted of the offence charged, no order can be made under this section. A. I. R. 1934 Oudh 199 = 11 O. W. N. 372 = 1934 O. L. R. 307 = 35 Cr. L. J. 686 = 148 I. C. 436 = 1934 Cr. C. 586. When there was no occasion for the use of any force or show of force on the part of the accused when they took possession of the property as the complainant was absent and no one on behalf of the complainant appeared to prevent the accused from committing the offences of which they have been convicted, no order can be made under this section. A. I. R. 1934 Oudh 185 (1) = 11 O. W. N. 472 = 1934 O. L. R. 356 = 35 Cr. L. J. 788 = 148 I. C. 790 = 1934 Cr. C. 581. Where the accused broke open the lock in the absence of the complainant, it cannot be said that possession was taken by the accused with any force or show of force. "Force" as defined in s. 349, I. P. C. contemplates the presence of the person using the force and or the person to whom the force is used. 15 Lah. 786.

WHEN ORDER SHOULD BE MADE.

3. Is notice to accused necessary ? [*P.* 1106, n. 10]—While a notice might undoubtedly be proper, it is not necessary under this section. 55 B. 155. But see A. I. R. 1932 Lah. 17 (1) = 1932 Cr. C. 27 = 135 I. C. 206 = 32 P. L. R. 758 = 33 Cr. L. J. 123 where it was held that an order for restoration by the appellate Court cannot be upheld when it was passed without the opposite party having been given an opportunity of raising objection to it.

4. Order not to be made after one month.—This section specifically limits the power of the Magistrate to pass an order at the time when he convicts and to any time within one month from the date of such conviction. The conduct of the accused in having preferred an appeal against such conviction or otherwise cannot extend the jurisdiction conferred by the Statute. 59 C. 1153 ; A. I. R. 1932 Lah. 210 = 135 I. C. 679 = 1932 Cr. C. 254 = 33 Cr. L. J. 191 = 33 P. L. R. 481 ; A. I. R. 1934 Pat. 154 = 15 P. L. T. 163 = 35 Cr. L. J. 1158 = 150 I. C. 787 = 1934 Cr. C. 339.

APPEAL AND REVISION.

5. Under the new amendment an order under this section may be made by any Court of Appeal, confirmation, reference or revision [*P. 1107, n. 11*].—Sub-section (3) expressly gives the appellate Court jurisdiction to pass an order, restoring possession under this section. *A. I. R. 1932 Lah. 17 (1) = 1932 Cr. C. 27 = 135 I. C. 206 = 32 P. L. R. 758 = 33 Cr. L. J. 123.* But *see A. I. R. 1932 Lah. 210 = 135 I. C. 679 = 1932 Cr. C. 254 = 33 Cr. L. J. 191 = 33 P. L. R. 481* where it was held that the words "Court of Appeal," etc., cannot refer to anything except the Courts dealing with the original conviction or trial and do not refer to the High Court in reference from the order restoring possession; there is no appeal from such an order and hence the words cannot possibly refer to this order. *See 56 B. 369 (F. B.)* where it was held that the words "Court of confirmation, appeal reference or revision" in s. 520 means any Court which has powers of appeal, confirmation, etc., in respect of the trial Court and that such Court can make any substantive order it thinks fit in respect of the property dealt with by the trial Court.

6. Limitation as to time not applicable to appellate or revisional Court.—There is nothing in sub-section (3) to limit the jurisdiction of an appellate Court to the passing of an order within one month, either of the original conviction or of the appellate order. It can hardly have been the intention of the Legislature that the appellate Court's order must necessarily be passed within a month of the original conviction, for that would make sub-section (3) infructuous in any case in which the pendency of the appeal exceeded one month. As to whether the appellate order ought to be within a month of the appellate Court's disposal of the appeal, there is no such limitation in the section. The Legislature did not intend to set a time-limit but has, it would seem, thought fit to rely on the discretion of the appellate and revisional Courts not to exercise their powers under this section in cases where there has been undue or excessive delay in moving the Court for its use. *12 Pat. 787; A. I. R. 1934 Pat. 154 = 15 P. L. T. 163 = 35 Cr. L. J. 1158 = 150 I. C. 787 = 1934 Cr. C. 339.*

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES

SECTION 526.

Amendment.—(a) In sub-section (5), for the words "has power under this section to award by way of costs" the words "may under this section award by way of compensation" shall be substituted;

(b) In sub-section (6-A), for the word "costs" the word "compensation" shall be substituted, and for the words "any expenses reasonably incurred by such person in consequence of the application" the words "such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case" shall be substituted;

(c) For sub-section (8), the following sub-section shall be substituted, namely:—

"(8) If in any inquiry under Chapter VIII or Chapter XVIII or in any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the Court shall, upon his executing, if so required, a bond without sureties, of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon:

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused";

(d) To sub-section (9), the following explanation shall be added, namely:—

“*Explanation.*—Nothing contained in sub-section (8) or sub-section (9) restricts the powers of a Court under section 344 ”;

(e) After sub-section (9) as so amended, the following sub-section shall be added, namely :—

“(10) If, before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon”—**Act XXI of 1932.**

Notes.—1. Relative powers of Local Government and High Court regarding venue of trial and transfer of cases.—Under the scheme of the Criminal Procedure Code the general framework of the administration of justice such as the division of the province into Sessions divisions and their boundaries, and places of sitting, the appointment of Sessions Judges and the classification of offences into those triable with a jury and those triable with assessors, is left under ss. 7 to 9 and s. 269 to the Local Government. But within this framework, the High Court has under the Government of India Act and the Letters Patent, the widest possible responsibility and the superintendence of the Courts and powers of transfer under s. 526 for the ends of justice and for the convenience of the parties and the like in any particular case; and such a transfer of any particular case from one Court or Judge to another within this framework is a matter to be decided by the High Court and not by the Local Government. The High Court cannot alter the regular place of sitting of any Sessions Court from the place directed by the Local Government under s. 9. But it can and repeatedly does under s. 526 change the venue of trial of any case from any one of these places to another both notified under s. 9. The only exception to the High Court's powers under s. 526 in a particular case is that laid down in sub-section (7), *viz.*, where under s. 197 (2) the Local Government has specified the officer or the Court or both by whom a Judge may be tried—*Per Madgavkar, J.* Where therefore, the Government acting under s. 193 (2) and s. 9 (2) issued a notification that a particular case shall be tried by a particular Judge at a particular place, it was held that the High Court, has got power under s. 526 to transfer the trial from that Court to another Court having equal jurisdiction, **55 B. 576 (S. B.)**

GROUND FOR TRANSFER.

2. Duty of High Court to create confidence in the administration of justice [*P. 1117, n. 15*].—Confidence in the Court administering justice on the part of both parties and of the public is a vital element in the administration of justice, so much so that a reasonable apprehension, tantamount to lack of confidence has been held by the Courts to render a transfer advisable. A special Judge or special venue directed by the Local Government is apt or at least is capable of being used to destroy this confidence and except where the supreme need of justice requires it, the ordinary course of justice is best left untouched. **55 B. 576 (S. B.)** It is a fundamental of the due administration of justice that Judges and Magistrates should not only be fair and impartial but also should appear to reasonable persons to be fair and impartial and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned, is biased either in their favour or against them. **10 Rang. 180.** It cannot be impressed too strongly on all judicial officers that they should deal at arm's length with persons engaged or interested in cases pending before them and should so conduct themselves as not to allow an impression to be created that they are on terms of undue familiarity with one of them. **A. I. R. 1934 Lah. 541 = 35 P. L. R. 478 = 36 Cr. L. J. 192 = 152 I. C. 896 = 1934 Cr. C. 820.** It is very necessary that no person on trial before a Court should have any fear that he may not receive absolutely fair treatment. **A. I. R. 1933 Oudh 480 = 10 O. W. N. 906 = 1933 Cr. C. 1397 = 147 I. C. 96; A. I. R. 1933 Rang. 9 = 147 I. C. 126 = 1933 Cr. C. 179; A. I. R. 1933 Rang. 320 = 35 Cr. L. J. 39 = 146 I. C. 303 = 1933 Cr. C. 1139.**

3. Trial by jury not a consideration to be ignored [See *P. 1118, n. 16 (ii)*].—The fact that the exercise of the powers of transfer on the merits of a particular case, whether for the convenience of parties and witnesses or for the ends of justice, might result in a change of place of trial or in a change from jury to assessors or *vice versa*, is in no way repugnant to the intention of the Legislature as expressed in s. 9 and s. 193 (2). But in a

case involving life or death to the accused, when the effect of the Government's notification changing the venue of trial is to deprive the accused of the right of trial by jury, it is impossible for the High Court to ignore the consideration that the accused rightly or wrongly attach great value to such right. *Per Madgavkar, J.* 55 B. 576 (S. B.)

4. Reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial, is the proper test [*P. 1118, n. 18*].—It is not necessary when supporting an application for transfer, to establish that there is any actual bias in the mind of the Magistrate concerned. It is the cumulative effect likely to be produced on the mind of an ordinary reasonable accused person, that has to be seen. *A. I. R. 1928 A. 396 (S. B.)*; *A. I. R. 1930 Lah. 877 = 31 Cr. L. J. 1172 = 127 I. C. 150 = 1930 Cr. C. 921 = 15 A. I. Cr. R. 73*. Where the apprehension though unreasonable, appears to be honestly entertained, the case should be transferred, particularly when the case had not yet begun and there was therefore no administrative inconvenience caused by such transfer. *A. I. R. 1933 Pat. 597 = 34 Cr. L. J. 1025 = 145 I. C. 524 = 1933 Cr. C. 1360*; *A. I. R. 1934 Oudh 452 = 11 O. W. N. 1193 = 1934 O. L. R. 788 = 35 Cr. L. J. 1483 = 151 I. C. 1003 = 1934 Cr. C. 1311*. Where the petitioner has an apprehension that the local atmosphere is to some extent poisoned against him and it appears that that apprehension is not quite unfounded, it is a proper case for transfer. *A. I. R. 1931 Lah. 540 = 32 P. L. R. 471 = 1931 Cr. C. 780 = 32 Cr. L. J. 1188 = 134 I. C. 519*. The mere fact that certain orders passed by the trying Magistrate are erroneous or illegal is not by itself sufficient to justify a transfer. But if the procedure adopted by him was such as to justify a reasonable apprehension in the minds of the accused persons that they would not have a fair and impartial trial in his Court, and the procedure was calculated to indicate that both parties to the trial were not being treated with equal fairness, transfer ought to be ordered. *A. I. R. 1931 Lah. 59 = 32 Cr. L. J. 253 = 129 I. C. 193 = 1931 Cr. C. 139*. Where the District Munsiff directed the filing of a complaint against the accused and on his appeal, the District Judge confirmed the order and the complaint came before the same District Judge as Sessions Judge it was held that there was cause for a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial before the same Judge who dismissed his appeal. (1934) *M. W. N. 862*. It is no ground for the transfer of a case from the Court of a Hindu or Muhammadan Magistrate to that of a European Magistrate merely because the parties belong to different religions or the dispute is of a communal or quasi-communal nature. It must be shown in each case that there is a reasonable apprehension in the mind of the person applying for it, that he will not get a fair trial. *A. I. R. 1934 Lah. 73 = 35 Cr. L. J. 624 = 148 I. C. 201 = 1934 Cr. C. 140*; *A. I. R. 1930 Lah. 168 = 31 Cr. L. J. 257 = 121 I. C. 374 = 1930 Cr. C. 176 = 13 A. I. Cr. R. 347*; *A. I. R. 1930 A. 737 = 1930 A. L. J. 606 = L. R. 11 A. (Cr.) 73 = 31 Cr. L. J. 555 = 123 I. C. 685 = 1930 Cr. C. 993*.

5. Incidents held to create reasonable apprehension that fair trial cannot be had [*P. 1121, n. 25*].—
(i) *Refusal to give copy of statement under s. 162*.—Where the Magistrate refused to give the accused a copy of the statement of a witness recorded by the police on the ground that there was no contradiction between the deposition of the witness and the statement given by him, whereas in fact, there was a material contradiction, it was held that the Magistrate must have been in some way prejudiced against the accused and an application for transfer was therefore well founded. *A. I. R. 1931 A. 273 = 129 I. C. 267 = L. R. 12 A. (Cr.) 36 = 15 A. I. Cr. R. 229 = 1931 Cr. C. 337 = 32 Cr. L. J. 370*. But if the refusal to grant such a copy was made under a *bonafide* mistake of law, it cannot be said that the Magistrate was prejudiced. *A. I. R. 1929 Nag. 172 = 30 Cr. L. J. 728 = 117 I. C. 213 = 1929 Cr. C. 47*.

(ii) *Magistrate sending back papers to the police instead of ordering prosecution*.—Where after going through the police-diary the Magistrate came to the conclusion that the investigation was not properly made and returned the papers to the police who then charged the accused, it was held that the Magistrate had the prosecution of the accused in mind at the time he sent the papers. If the Magistrate came to the conclusion that the accused should be prosecuted, his proper course was to pass an order under s. 190(1)(c) in which case it would be open to the accused to ask for a transfer under s. 191. *A. I. R. 1931 A. 273 = 129 I. C. 267 = L. R. 12 A. (Cr.) 36 = 15 A. I. Cr. R. 229 = 1931 Cr. C. 337 = 32 Cr. L. J. 370*.

(iii) *Magistrate sending for the complainant and pressing him to compromise the matter* [See *n. 25 (xvii)*].—It is highly improper on the part of a trying Magistrate to send for a party to a case pending in his Court to his house and then to press upon him the desirability of a compromise. Such a course is likely to raise a reasonable apprehension in the mind of the complainant that the Magistrate is showing favour to the other side and that he would not have a fair and impartial trial in his Court. *A. I. R. 1931 Lah. 32 = 1931 Cr. C. 96 = 130 I. C. 430 = 32 Cr. L. J. 537 = 32 P. L. R. 358 = 16 A. I. Cr. R. 42*.

(iv) *Magistrate taking steps to put down picketting in his executive capacity*—Where the Magistrate in his capacity as executive officer had been taking steps to put down picketting of certain shops, it would be very desirable and would promote that confidence in the administration of justice which is all important, that such a Magistrate should not hear cases arising out of the picketting, in his judicial capacity. **A. I. R. 1931 Lah. 30 = 32 P. L. R. 272 = 1931 Cr. C. 94 = 130 I. C. 330 = 32 Cr. L. J. 491 = 16 A. I. Cr. R. 127.**

(v) *Magistrate forming opinion before hearing evidence*—Where a Magistrate not only formed but expressed an opinion strongly adverse to the party even before he had heard a single word of the evidence in the case, the case should be transferred. **8 Rang. 654.**

(vi) *District Magistrate improperly interesting himself in the case*—Where the District Magistrate directed the Subordinate Magistrate to cancel the bail bond by the sureties of the accused, and also wrote to the Sessions Judge requesting him to review the order granting bail to the accused, it is not unreasonable that the accused should fear that they might not get impartial justice if the case is tried in that district. The action of the District Magistrate giving directions to his subordinate and trying to influence the Sessions Judge was unjustifiable and improper. **10 Rang. 180.** Where the accused cited the District Magistrate as a defence witness and summons was ordered to issue to him accordingly whereupon the District Magistrate sent a memo. to the trying Magistrate calling his attention to s. 257, and on receipt of the memo. the trying Magistrate cancelled his order for summoning the District Magistrate behind the back of the accused, it was held that the apprehension in the mind of the accused that he will not have a fair trial before the trying Magistrate or any other Magistrate subordinate to the District Magistrate was not only genuine but also reasonable. **A. I. R. 1934 Nag. 39 = 1934 Cr. C. 152 = 35 Cr. L. J. 411 = 147 I. C. 289.**

(vii) *Refusal to give a copy of the statement to the police under s. 162*—Where the Magistrate showed irritation at the request of the accused under s. 162 to be granted a copy of the statement of a witness to the police, by insisting on a written application and passing an order thereon more than two months afterwards refusing the request for no valid reason, *held* that it would naturally give an accused person reasonable belief that the Magistrate had no reason to be fair to him. **A. I. R. 1930 A. 737 = 1930 A. L. J. 606 = L. R. 11 A. (Cr.) 73 = 31 Cr. L. J. 555 = 123 I. C. 685 = 1930 Cr. C. 993.**

(viii) *Magistrate unnecessarily prolonging proceedings on bail application*—Where the Magistrate for erroneous reasons refused to accept the bail bonds in respect of bailable offences and unnecessarily prolonged the proceedings it was held that the procedure adopted was likely to raise a reasonable apprehension in the minds of the accused. **A. I. R. 1932 Lah. 440 = 33 P. L. R. 416 = 1932 Cr. C. 519 = 34 Cr. L. J. 89 = 141 I. C. 43.**

(ix) *Handing over judicial records to Superintendent of Police, cited as a witness*—Where the Superintendent of Police was cited as a defence witness and on the date fixed for his examination it was found that the records of the case had been sent for by him and were handed over to him, the incident was such as to raise a reasonable apprehension in the mind of the accused. **A. I. R. 1932 Lah. 294 = 136 I. C. 9 = 33 Cr. L. J. 223 = 33 P. L. R. 438 = 1932 Cr. C. 442.**

(x) *Continuing hearing when application for transfer is made*—When the application for transfer was made the Magistrate continued the hearing of the case, and pending the hearing of the application he cancelled the bail of the accused which was however granted by the Sessions Judge on application, *held* that the accused may have a reasonable apprehension of bias. **A. I. R. 1933 Lah. 914 = 145 I. C. 173 = 34 Cr. L. J. 900 = 1933 Cr. C. 1375 ; A. I. R. 1933 Sind 307 = 34 Cr. L. J. 1144 = 146 I. C. 20 = 1933 Cr. C. 1041.**

(xi) *Examining accused under s. 342 on instructions given by prosecuting Counsel*—Where the Magistrate made use of a document obtained from Counsel for the prosecution and basing his examination on detailed instructions given therein, *held* that the Magistrate's action was improper and the accused was entitled to a transfer. **A. I. R. 1933 Nag. 269 = 16 N. L. J. 158 = 34 Cr. L. J. 1172 = 146 I. C. 149 = 1933 Cr. C. 1003 ; A. I. R. 1930 Lah. 166 = 31 Cr. L. J. 560 = 123 I. C. 570 = 1930 Cr. C. 174.** A Magistrate cross-examining a prosecution witness after the defence had cross-examined him, on points suggested by the Public Prosecutor gives rise to reasonable apprehension. **A. I. R. 1930 Lah. 173 = 31 Cr. L. J. 736 = 124 I. C. 688 = 1930 Cr. C. 131.**

(xii) *Magistrate having knowledge of dispute in executive capacity or otherwise*.—See (1934) **M. W. N. 97 ; A. I. R. 1929 C. 809 = 1929 Cr. C. 597.**

(xiii) *Improperly rejecting sureties offered under s. 122*—Where the Magistrate rejected all the sureties offered, without holding an inquiry as to their fitness or otherwise and further demanded enhanced security each time, *held* the circumstances were such as to raise a reasonable apprehension in the mind of the accused. **A. I. R. 1935 A. 517.**

(xiv) *Examining prosecution witnesses at late hours*—Where the witnesses for the complainant were examined after 9 p.m. in contravention of the directions of the High Court that no new cases should be taken up by the subordinate Courts after 4 p.m. there was sufficient ground for transfer. **14 Lah. 201.**

6. Incidents held not sufficient to prove any bias [*P. 1123, n. 26*]—

(i) *That the Magistrate is already trying another case against accused*—The fact that a Magistrate is trying or has tried one case against an accused person is no reason why he should not try any subsequent case against the same person when no allegation of prejudice or unfair treatment has been made. **A. I. R. 1933 Nag. 201 = 29 N. L. R. 338 = 34 Cr. L. J. 1035 = 145 I. C. 445 = 1933 Cr. C. 797.**

(ii) *Magistrate being friend of complainant*—That the Magistrate is a personal friend of the complainant is no ground for transferring a case. **33 Bom. L. R. 311 = A. I. R. 1931 B. 206 (1) = 32 Cr. L. J. 805 = 131 I. C. 891 = 1931 Cr. C. 350.**

7. When is formation of a previous opinion in another case a ground for transfer? [*P. 1124, n. 28*]—

No hard and fast rule can be laid down for the trial of counter-cases. It is sufficient to say that there can be nothing irregular in a Judge trying each case to a conclusion before different assessors and afterwards pronouncing judgment in both so long as he tries the one quite independently of the facts of the other. Should the Judge however feel that he is likely to be embarrassed by the adoption of this procedure he will no doubt get a transfer of the counter-case to the file of another Sessions Judge. What must be made clear is (1) that the trial must be separate, *i.e.*, before different assessors and separate judgments delivered; (2) that the conclusions in each case must be founded on, and only on the evidence in each case, and (3) that if a Judge considers himself unable to detach himself from extraneous considerations, a transfer may be necessary to deliver the Judge from this embarrassment. **56 M. 159 (F. B.).** The mere fact that the counter-complaint by the accused has been dismissed does not mean that the Magistrate has prejudged the other case against him or that he is not prepared to hold that the other complaint is also false. **A. I. R. 1935 Sind 72 = 1935 Cr. C. 277; A. I. R. 1930 Pat. 337 = 11 P. L. T. 248 = 31 Cr. L. J. 732 = 124 I. C. 846.** In a case and counter-case of rioting a Judge is not, merely by reason of his having decided the counter-case incompetent to try the other case. But if he has already arrived at findings in the one case he will find it embarrassing to arrive at a different finding in the other. Where he has also expressed his view that it will not be possible for him to give a different finding, the apprehension of the accused is justified and a transfer of the case will be proper. **A. I. R. 1933 Oudh 21 = 9 O. W. N. 963 = 34 Cr. L. J. 46 = 140 I. C. 685 = 1933 Cr. C. 59 = 19 A. I. Cr. R. 119; A. I. R. 1934 Lah. 458 = 35 P. L. R. 427 = 152 I. C. 1060 = 1934 Cr. C. 704.**

8. *Other grounds for transfer* [*P. 1126, n. 32*]—“*That such an order is expedient in the ends of justice,*” *sub-sec. (1) (e)* [*N. 32 (iv)*]—Where the trial is complicated in its nature and bound to attract difficult questions of law for decision by the Court seized of the case and where the facts disclose certain other offences exclusively triable by the Court of Session, it is just and proper that the case should be transferred to the Court of Session. **A. I. R. 1934 Oudh 349 = 11 O. W. N. 780 = 1934 O. L. R. 481 = 35 Cr. L. J. 928 = 149 I. C. 235 = 1934 Cr. C. 1018.**

SUB-SECTIONS (2) TO (7)—PRACTICE.

9. *Supply of copy of lower Courts' Report to accused*.—In the Bombay High Court the practice prevails of furnishing the applicant with a copy of any report which the Court may receive from the Subordinate Court from which it is sought to transfer the case. **A. I. R. 1931 B. 206 (1) = 33 Bom. L. R. 314 = 1931 Cr. C. 350 = 131 I. C. 889 = 32 Cr. L. J. 804.**

10. *Delay in applying for transfer strongly condemned* [*P. 1127, n. 36*]—An application for transfer ought to be put forward at the earliest possible opportunity after the occurrence of whatever facts or circumstances are alleged as affording a reasonable ground for such application. The applicant cannot be allowed to tarry to the jurisdiction only so long as he thinks that the decisions are likely to go in his favour. **A. I. R. 1933 Sind 17 = 26 S. L. R. 255 = 33 Cr. L. J. 908 = 139 I. C. 791 = 1933 Cr. C. 17.**

11. **To whom the case may be transferred** [*P. 1128, n. 38*].—The Assistant Sessions Judge, the Additional Sessions Judge and the Sessions Judge exercise co-ordinate or equal jurisdiction of a Sessions Court within the limits of the authority conferred on them by the Code and are nevertheless different Courts each subordinate to the High Court. The High Court has therefore power to transfer a case from the Court of the Additional Sessions Judge to the Court of the Sessions Judge. 55 B. 576 (S. B.)

12. **Sub-section (3). Party interested** [*P. 1128, n. 39-A*].—The language of sub-section (3) is sufficiently wide and comprehensive and a person who has lodged the complaint and moved the machinery of the police and the criminal Courts continues to be a party interested and is entitled to move the High Court for a transfer of the case. But when the prosecution is in the hands of the Public Prosecutor, there must be exceptionally strong grounds before the power of transfer is exercised at the instance of a private complainant. A. I. R. 1934 Lah. 612 = 35 P. L. R. 567 = 152 I. C. 1053 = 1934 Cr. C. 942. When a complaint is made by the Court under s. 476 even though on application made by a private party, it is the Court which is the complainant, and not the private party. The latter is not even a "party interested" so as to have the *locus standi* to make an application for transfer under sub-section (3). A. I. R. 1930 Lah. 873 = 31 P. L. R. 840 = 31 Cr. L. J. 1174 = 127 I. C. 152 = 1930 Cr. C. 917 = 15 A. I. Cr. R. 82.

13. **Sub-section (4). Affidavit in support of transfer must conform to the provisions of s. 539.**—Under sub-section (4) every application except an application by the Advocate-General shall be supported by an affidavit. S. 539 lays down the persons before whom it is to be sworn. An affidavit purporting to be sworn to before an officer of the District Judge's Court is not sufficient for the purposes of this section. A. I. R. 1931 G. 710 (1) = 134 I. C. 1278 = 1931 Cr. C. 990 = 33 Cr. L. J. 61; A. I. R. 1933 Nag. 201 = 29 N. L. R. 338 = 34 Cr. L. J. 1035 = 145 I. C. 445 = 1933 Cr. C. 797.

14. **Sub-section (6-A). "Person" includes Local Government.**—The words "any person" in this sub-section is comprehensive enough to include (1) the Crown or the Local Government; (2) any private individual who has an interest in the subject-matter of the complaint as also (3) all or any of the accused persons. Where an application for transfer of a case has been thrown out on the ground that it is frivolous or vexatious the Local Government opposing the application is entitled to recover its costs from the applicants. 52 A. 263 (F. B.)

Adjournment of hearing on Notification of Intention to move the High Court—Sub-sec. (8).

15. **Adjournment obligatory** [*P. 1129, See n. 49*].—The section is absolutely imperative in its terms and to refuse adjournment contrary to the terms of the section is to exercise a power of trial the Court does not possess and to vitiate the whole subsequent proceedings. A. I. R. 1931 B. 411 = 33 Bom. L. R. 668 = 1931 Cr. C. 726 = 32 Cr. L. J. 1161 = 134 I. C. 361; A. I. R. 1935 Sind 27 = 1935 Cr. C. 121; A. I. R. 1930 A. 263 = 1930 A. L. J. 547 = L. R. 11 A. (Cr.) 70 = 31 Cr. L. J. 590 = 124 I. C. 17 = 1930 Cr. C. 375 = 13 A. I. Cr. R. 379; 53 M. 165.

16. **When adjournment is granted Court is not *functus officio* to order miscellaneous applications.**—The grant of an adjournment to enable the accused to move the High Court, does not mean that the trial Magistrate loses seisin of the case or is rendered incapable of even disposing of miscellaneous applications for grant of copies, inspection of records, etc. A. I. R. 1931 Lah. 59 = 129 I. C. 193 = 32 Cr. L. J. 253 = 1931 Cr. C. 139.

17. **"Accused" in sub-section (8) means all the accused as a whole.**—Every accused is not, in turn, entitled to have an adjournment to apply for a transfer. The words "or the accused" apply to the accused as a whole, and although any further incident might give rise to a fresh application, it would equally give rise to a fresh application by the same applicant provided always there was something to justify or form the foundation of the application. 12 Lah. 668. See the present proviso to sub-sec. (8) inserted by Act XXI of 1932.

18. **Proceedings after application for adjournment whether void** [*P. 1130, n. 51*].—The refusal of the Magistrate to adjourn the case, though not justified and was contrary to the provisions of the section, is an irregularity which can be cured under s. 537. 59 C. 478.

19. "Trial" whether includes stage of judgment [*P.* 1131, *n.* 51-A]—The word "trial" must be held to include judgments also. 59 C. 478.

20. No adjournment when proceedings are in stage of inquiry.—Where the proceedings are only in the inquiry stage, the Magistrate is not bound to grant an adjournment for making the application for transfer. (1934) M. W. N. 743.

21. Under sub-sec. (8) accused is entitled to apply direct to the High Court.—Since the introduction of the present sub-section (8) the accused has a right to come to the High Court direct and such right cannot in any way be excluded. 32 Bom. L. R. 1128 (F. B.) = A. I. R. 1930 B. 480 = 129 I. C. 399.

22. High Court's power to stop frivolous applications.—Where successive applications are made which are frivolous and meant to defeat the ends of justice, the High Court should exercise its inherent power under s. 561-A to prevent such abuse of the process of any Court. Such frivolous and vexatious applications also amount to contempt of Court which could be punished in various ways. The person making such applications may also be ordered to give security for costs of the other party. 54 B. 553 (F. B.)

SECTION 526-A.

Amendment.—In sub-section (1) after the words "Naval Discipline Act" the brackets, words and figures "[other than a person to whom that Act applies by virtue of the Indian Navy (Discipline) Act, 1934]" shall be inserted—**Act XXXV of 1934.**

SECTION 528.

Notes.—1. Magistrate may act *suo motu*.—There is nothing in this section which disables the Magistrate from taking action unless he is set in motion by the petition of one of the parties. Orders of transfer are frequently made for reasons of administrative convenience and it is not the intention of the Legislature to make an application from either party a necessary preliminary. A. I. R. 1933 Sind 205 = 34 Cr. L. J. 861 = 144 I. C. 881 = 1933 Cr. C. 718.

2. Good reasons to be recorded for transfer [*P.* 1134, *n.* 8]—The discretion of Magistrates in transferring cases from the files of Subordinate Magistrates is unfettered, but before an order under this section is made the Magistrate should have reasons and those reasons should be such as the law regards as satisfactory from the point of view of principle. 58 C. L. J. 214 = A. I. R. 1934 C. 137 = 35 Cr. L. J. 597 = 148 I. C. 121 = 1934 Cr. C. 177.

3. Effect of omission to record reasons [*P.* 1134, *n.* 9]—The omission to record reasons is merely an irregularity and affords no ground for interference. A. I. R. 1933 Lah. 807 = 1933 Cr. C. 1040 = 146 I. C. 166 = 34 Cr. L. J. 1174; A. I. R. 1933 Lah. 385 = 143 I. C. 474 = 1933 Cr. C. 639 = 34 P. L. R. 577 = 34 Cr. L. J. 630.

4. Notice to be served on the party [*P.* 1135, See *n.* 11]—The fundamental principles of justice require that no order should be passed to the prejudice of a party in his absence and behind his back, and that he should be given an opportunity of contesting the order before it is passed. It is necessary therefore that notice should be served on the party before action is taken under this section. A. I. R. 1931 Lah. 29 = 32 P. L. R. 356 = 1931 Cr. C. 93 = 130 I. C. 330 = 32 Cr. L. J. 492 = 16 A. I. Cr. R. 120; 1930 A. L. J. 148 = A. I. R. 1929 A. 932 = 31 Cr. L. J. 30 = 120 I. C. 261 = 1929 Cr. C. 660 = L. R. 11 A. (Cr.) 48; (1929) M. W. N. 265 = 30 M. L. W. 401 = A. I. R. 1929 M. 511 = 2 M. Cr. C. 93 = 30 Cr. L. J. 1043 = 119 I. C. 385 = 1929 Cr. C. 12. The giving of notice is desirable, but the mere fact that the Magistrate has not done so does not make the order bad in law. A. I. R. 1933 Lah. 385 = 34 P. L. R. 577 = 143 I. C. 474 = 1933 Cr. C. 639 = 34 Cr. L. J. 630; A. I. R. 1933 Sind 205 = 34 Cr. L. J. 861 = 144 I. C. 881 = 1933 Cr. C. 718.

5. Sessions Judge cannot transfer appeal from Additional Sessions Judge.—The Sessions Judge has no jurisdiction himself to transfer an appeal from the file of the Additional Sessions Judge to his own file. Even supposing he had such jurisdiction, an Additional Sessions Judge cannot issue such an order to another Judge of equal jurisdiction to himself. A. I. R. 1931 A. 435 = 1931 A. L. J. 591 = 1931 Cr. C. 707 = 16 A. I. Cr. R. 123 = L. R. 12 A. (Cr.) 113 = 135 I. C. 252 = 33 Cr. L. J. 158.

6. After transferring case, superior Magistrate cannot take part in it [*P.* 1136, *n.* 20]—Where a Magistrate has become properly seized of a case by transfer or otherwise, he is seized of the whole matter and a superior Magistrate cannot take action except under Chapter XXXII or by withdrawal of the case to his own Court. 57 C. 17; A. I. R. 1930 M. 705 = (1930) M. W. N. 413 = 3 M. Cr. C. 243 = 31 Cr. L. J. 895 = 125 I. C. 557 = 1930 Cr. C. 652 = 14 A. I. Cr. R. 511.

7. Revision [*P.* 1137, *n.* 23]—The High Court has power to revise an order of transfer made on improper and inadequate grounds. A. I. R. 1933 Sind 205 = 34 Cr. L. J. 861 = 144 I. C. 881 = 1933 Cr. C. 718.

CHAPTER XLIV-A.

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS.

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SECTION 528-B.

Note.—Whether proceeding in revision is a “subsequent stage of the case.”—S. 439 confers no rights on a person convicted by a trial Court or a lower appellate Court to invoke the revisional jurisdiction of the High Court. The exercise of that jurisdiction is purely discretionary. The hearing in revision cannot therefore be described as a subsequent stage of the case. If the language of s. 528-B is ambiguous, it must be construed in favour of the accused. 60 C. 676.

Contra—An appeal or revision is clearly a subsequent stage of a trial and a European British subject who has waived his right to be tried as such before the Magistrate, is definitely debarred from asserting it or claiming the special procedure before the appellate or revisional Court. A. I. R. 1933 Pesh. 6 = 1933 Cr. C. 148 = 141 I. C. 445.

CHAPTER XLV.

OF IRREGULAR PROCEEDINGS.

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SECTION 530.

Notes.—1. Proceedings not void, because another section not triable by the Magistrate could also be charged in the complaint [*P.* 1143, See *n.* 6]—Where the Magistrate was entitled to try the accused under the sections named in the complaint, the trial is not void because another section could also be charged in the complaint. A. I. R. 1931 A. 10 = L. R. 11 A. (Cr.) 187 = 1930 A. L. J. 1422 = 15 A. I. Cr. R. 25 = 129 I. C. 257 = 32 Cr. L. J. 360.

Clause (o).

2. Where a Sub-divisional Magistrate not exercising the powers of a District Magistrate heard an appeal under s. 515, his proceedings were illegal. A. I. R. 1934 Lah. 294 = 1934 Cr. C. 525.

Clause (p).

3. A Magistrate trying a case which has not been taken cognizance of by him, or has not been sent to him in the proper way or withdrawn by him in the proper way has no jurisdiction to try it. A. I. R. 1930 M. 705 = (1930) M. W. N. 413 = 3 M. Cr. C. 243 = 31 Cr. L. J. 895 = 125 I. C. 557 = 1930 Cr. C. 652 = 14 A. I. Cr. R. 511.

SECTION 531.

Note.—Section applies to any place in British India where the Code applies [*P.* 1144, *n.* 1]—S. 531 operates wherever in British India any finding, sentence or order of any criminal Court has been arrived at or passed in a wrong Sessions division, district, sub-division or other local area *ejusdem generis* with a sub-division, provided that in such area the Criminal Procedure Code runs. 9 Rang. 338.

SECTION 532.

Note.—Effect on commitment where previous sanction is necessary for initiation of proceedings [*P.* 1146, *n.* 5]—This section does not apply to a case where the prosecution is illegal on the ground of want of previous sanction. In such a case there is no question of the power of the Magistrate to commit the accused, but the defect is that there was no previous sanction and the commitment is therefore wholly illegal. *A. I. R. 1934 A. 963 = 4 A. W. R. 524 = 1934 A. L. J. 965 = 1934 A. L. R. 1025 = 36 Cr. L. J. 137 = 152 I. C. 667 = 1934 Cr. C. 1291 (F. B.)*

SECTION 533.

Note.—Where the Magistrate did not take down the statement of the confessing person as required by law, the error was cured by the fact that the Magistrate was examined on oath under s. 533 and gave evidence that the statements were actually made before him. *A. I. R. 1934 Rang. 78 = 35 Cr. L. J. 823 = 148 I. C. 1002 = 1934 Cr. C. 401.* If a statement be not recorded strictly in conformity with s. 164, but so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, this section can be resorted to and evidence taken that the accused person duly made the statement recorded. *7 Rang. 759.*

See notes under s. 164.

SECTION 536.

Note.—Trial with assessors not chosen according to law is illegal.—A trial began as a jury trial and continued as such. When the case had reached a crucial point the Judge found that it was triable with assessors only and he thereupon directed that “the jurors will henceforth be considered as assessors.” It was held that the persons who gave their opinions as assessors “were not summoned to act as such” under s. 284 and therefore they were not chosen according to law and the trial was illegal. *A. I. R. 1933 Oudh 351 = 10 O. W. N. 619 = 34 Cr. L. J. 1093 = 145 I. C. 803 = 1933 Cr. C. 994.*

SECTION 537.

Notes.—1. **General scope of the section** [*P.* 1152]—In order that an infringement of the provisions of the Code should be of such a nature that it does not come within the purview of s. 537, it must go to the root of the trial and must in effect vitiate the proceedings. It must in effect amount to an assumption by the Court of a jurisdiction which it does not possess or a failure to exercise a jurisdiction which it does possess. *13 Rang. 1; 54 B. 934.* When the decision of a criminal Court appears in substance to be correct, an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure have been transgressed; except where the breach is of so grave a nature that the form of trial was substantially different from that provided by law for the offence charged or where the breach of rules has in fact occasioned a failure of justice. *57 C. 1228 (F. B.)* In applying this section no distinction ought to be introduced between “illegality” and “irregularity.” The sole criterion is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice, but if in spite of even total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong. *55 A. 301 (F. B.)*

II.—SECTION APPLIES ONLY TO IRREGULAR PROCEEDINGS OF COMPETENT COURTS.

2. Court of competent jurisdiction [*P.* 1155, *n.* 10]—Where a Second-class Magistrate tried the accused for an offence which he had no power to try, it is a matter which goes to the very root of the case and is not covered by this section. *A. I. R. 1933 Lah. 1009 = 1933 Cr. C. 1554 = 147 I. C. 737.*

III.—CL. (a).—ERROR, OMISSION OR IRREGULARITY IN THE COMPLAINT.

3. Clause applies to a complaint under s. 476.—A pure technical irregularity in the heading of a complaint of Court under s. 476 is cured by this clause. *16 Lah. 153.*

4. Entire absence of a complaint vitiates the trial [*P. 1155, n. 17*].—The want of a complaint for a particular offence is quite different from an error, omission or irregularity in the complaint. If there is no complaint, the case does not fall under s. 537. *A. I. R. 1930 Rang. 153 = 31 Cr. L. J. 1060 = 126 I. C. 530 = 1930 Cr. C. 585.*

5. Omission to examine complainant at once [*P. 1155, n. 18*].—*See* note 2 to s. 200.

6. Cognizance without proper complaint under s. 198.—*See* note 1 to s. 198.

IV.—CL. (a)—ERROR, OMISSION OR IRREGULARITY IN SUMMONS OR WARRANT.

7. Omission to state particulars in summons.—Omission to state the particulars of the offence in the summons, causes prejudice to the accused and the defect is not cured by this section. *A. I. R. 1934 Oudh 370 (2) = 11 O. W. N. 828 = 1934 O. L. R. 656 = 35 Cr. L. J. 1161 = 150 I. C. 941 = 1934 Cr. C. 1156.*

8. Failure to give thirty days' time in proclamation under s. 87.

See note to s. 87.

V.—CL. (a)—ERROR, OMISSION OR IRREGULARITY IN CHARGE.

9. Omission to frame charge.—*See* note 2 to s. 254.

10. Errors and omissions in charges [*P. 1157, n. 32*].—Defects in the form of charge are immaterial unless they lead to failure of justice. (1930) *M. W. N. 1041 = 35 M. L. W. 98 = A. I. R. 1931 M. 225 = 3 M. Cr. C. 390 = 32 Cr. L. J. 753 = 131 I. C. 458 = 1931 Cr. C. 321; A. I. R. 1935 Sind 34 = 28 S. L. R. 304 = 1935 Cr. C. 163.* Failure to define expressly and accurately the common object with which an unlawful assembly acts, is an error which may be cured by this section. (1930) *M. W. N. 80 = 31 M. L. W. 236 = A. I. R. 1930 M. 188 = 3 M. Cr. C. 67 = 31 Cr. L. J. 347 = 121 I. C. 862 = 1930 Cr. C. 188 = 14 A. I. Cr. R. 17.* *See* note 1 to s. 222 and note 1 to s. 242.

VI.—CL. (a)—ERROR, OMISSION OR IRREGULARITY DURING TRIAL.

11. Joint trial of cross-cases [*P. 1158, n. 37*].—The irregularity of a joint trial of cross-cases, the prosecution evidence in the one being the defence evidence in the other, can be cured under this section where it has not been shown that the accused was in any way prejudiced by the procedure. *1935 A. L. J. 423.*

12. Effect of misjoinder of charges [*P. 1159, n. 39*].—*See* notes 4 and 5 to s. 233.

13. Effect of multiplicity in the charge [*P. 1159, n. 40*].—*See* notes to s. 234.

14. Effect of misjoinder of parties [*P. 1160, n. 41*].—*See* notes to s. 239.

15. Errors, etc., in judgments.

(i) *Effect of initialling and not signing judgment*—*See* note 1 to s. 265.

(ii) *Delivery of judgment after ceasing to hold office*—*See* note 1 to s. 367.

VIII.—CL. (a)—ERROR, OMISSION OR IRREGULARITY IN OTHER PROCEEDINGS BEFORE OR DURING TRIAL.

16. Irregularities in searches.—*See* note 4 to s. 103.

17. Irregularity in security proceedings.—*Omission to give full particulars in notice under s. 112.* *See* note 5 to "General notes to Chapter" at p. 19, *supra*.

18. Irregularity in proceedings under Chap. X.—*Failure to question accused under s. 139-A regarding denial of public right.*—*See* note 5 to s. 139-A.

19. Irregularities in investigation, Ch. XIV.—Failure by the police-officer to conduct properly the investigation into an offence cannot vitiate a trial which was started on the final report after the investigation. If there was any irregularity in the conduct of the investigation, any suspicion as to the truth of the prosecution case engendered by the irregularity would be considered by the Court, in determining the truth of the charge. *A. I. R. 1931 Pat. 150 = 131 I. C. 47 = 1931 Cr. C. 390 = 12 P. L. T. 393 = 32 Cr. L. J. 638 = 15 A. I. Cr. R. 508.*

20. Want of certificate of Political Agent.—*See* note 3 to s. 188.

21. **Irregularities in Warrant-cases, Chap. XXI.**—*Failure to record reasons for asking accused forthwith whether he wishes to cross-examine prosecution witnesses.*—See note 5 to s. 256.

22. **Irregularity in summary trials.**

(i) *Omission to record plea of the accused.*—See note 4 to s. 263.

(ii) *Failure to sign judgment by all members.*—See note 2 to s. 265.

23. **Irregularities in Sessions trials, Chap. XXIII.**—*Summoning of less than double the number of jurors, s. 326.*—It is a mere irregularity to summon less than double the number of jurors required for a trial in contravention of the provisions of s. 326 and such irregularity would not vitiate the trial unless there has been a failure of justice occasioned thereby. 10 Pat. 107 following 57 C. 1228 (F. B.)

Erroneous decision as to right of reply.—An erroneous decision as to the right of reply is not an illegality or such a substantial irregularity as to vitiate the whole proceedings. 13 Lah. 172.

24. **Examination of accused.**—See notes under s. 342.

25. **Effect of irregularities in local investigation [P. 1163, n. 52-A]**—*Not placing a note of inspection on record.*—Omission to record a memorandum of the relevant facts observed at the inspection under s. 539-B is not an irregularity which would vitiate the whole of the proceedings unless it occasioned a failure of justice by prejudicing the accused. 53 A. 706; 53 A. 215; A. I. R. 1932 A. 28 = 1932 A. L. J. 523 = L. R. 12 A. (Cr.) 150 = 33 Cr. L. J. 124 = 135 I. C. 226 = 1932 Cr. C. 37 = 16 A. I. Cr. R. 421.

26. **Examination of witnesses and recording evidence.**—See note 1 to s. 356 as to effect of non-compliance with the provisions of that section.

Evidence not translated to accused—See note to s. 361.

27. **Irregularities in appeal, reference and revision.**

(i) *Omission to state reasons for taking additional evidence*—See note 2 to s. 428.

(ii) *Failure to give notice to accused when ordering further inquiry*—See note 6 to s. 436.

IX.—CL. (a)—ERROR, OMISSION OR IRREGULARITY IN OTHER PROCEEDINGS.

28. **Orders under Chap. XII [P. 1165, n. 58]**—The omission on the part of the Magistrate to record the fact that he was satisfied that a dispute likely to cause a breach of the peace existed and further to record the grounds on which he was so satisfied, if it has not in any way prejudiced the accused, is cured by this section. 55 A. 301 (F. B.); 54 A. 1002.

See note 19 to s. 145.

29. **Proceedings under the Child Marriage Restraint Act, 1929.**—Failure to record reasons under s. 11 (1) of the Act for not requiring the complainant to execute a bond, is an irregularity which could not be cured under s. 537 of the Code. A. I. R. 1933 C. 433 (1) = 37 C. W. N. 626 = 34 Cr. L. J. 554 = 143 I. C. 279 = 1933 Cr. C. 705. But where the complaint was made by a judicial officer, the omission to record reasons cannot be held to vitiate the proceedings. A. I. R. 1933 Pat. 87 = 43 P. L. T. 791 = 34 Cr. L. J. 237 = 141 I. C. 810 = 1933 Cr. G. 211.

X.—WANT OF AND IRREGULARITY IN SANCTION.

30. **Initiation of proceedings without complaint as required by the sections of the Code, void *ab initio* [P. 1165, n. 59]**—A Court confronted with a complaint by a private person and not preferred under s. 476 must refuse to take cognizance. It cannot even examine the complainant on oath and then note that it is only taking cognizance of offences not referred to in s. 195 because the examination of the complainant under s. 200 is after cognizance has been taken. To take cognizance in such cases is much more than a mere irregularity in the complaint and the error cannot be corrected under s. 537. 55 M. 343. The omission of cl. (b) of s. 537 of the Code by the amending Act of 1923, clearly shows that the absence of any complaint as required by s. 195 of the Code would be fatal to any prosecution initiated without such complaint. 9 Luck. 594.

31. **Want of sanction under s. 196-A.**—See note 5 to s. 196-A.

CHAPTER XLVI.

MISCELLANEOUS.

* * * * *

SECTION 539-A.

Note.—Accused person swearing to false affidavit can be prosecuted.—There is nothing to show that this section does not apply to accused persons. If an accused person chooses to come within the scope of this section and swears to a false affidavit for transfer, he should be liable to punishment which can be inflicted upon persons who swear to such false affidavits. 55 A. 114.

SECTION 539-B.

Notes.—1. **Omission to record memorandum** [*P.* 1169, *n.* 2].—Local inspection must be held sparingly and the danger of such local inspection is intensified when one or both of the parties are absent at the time of the inspection. Where no separate record was made by the Judge concerning the inspection of the locality and the facts that he found, the imperative provisions of s. 539-B are not complied with. 7 Luck. 208. Failure to record the memorandum will not vitiate the trial unless it has occasioned a failure of justice. 53 A. 766; 53 A. 215; A. I. R. 1932 A. 28 = 1932 A. L. J. 523 = L. R. 12 A. (Cr.) 150 = 33 Cr. L. J. 124 = 135 I. C. 226 = 1932 Cr. C. 37 = 16 A. I. Cr. R. 421.

2. **Report must be signed by all the members of the Bench, making the inspection.**—A report signed by four Magistrates one of whom did not take part in the judgment, and one of the Magistrates who took part in the judgment did not sign in the memorandum, would contravene both the spirit and the letter of this section. (1932) M. W. N. 645 = A. I. R. 1932 M. 676 = 37 M. L. W. 149 = 5 M. Cr. C. 209 = 138 I. C. 608 = 33 Cr. L. J. 655 = 1932 Cr. C. 834; A. I. R. 1935 Nag. 77 = 17 N. L. J. 269.

3. **Court cannot base its judgment on the memorandum only.**—The memorandum is to be used “for properly appreciating the evidence given at the inquiry or trial.” The Court cannot base its judgment on its own inspection note. There must be substantive evidence apart from the inspection note which is merely to aid it in appreciating the evidence before the Court. A. I. R. 1934 A. 325 = 1934 A. L. R. 429 = 35 Cr. L. J. 708 = 148 I. C. 615 = 1934 Cr. C. 409 = 1934 A. L. J. 1179 = 4 A. W. R. 1608.

SECTION 540.

Notes.—1. **How discretion vested in Court ought to be exercised** [*P.* 1169, *n.* 1].—Where the alleged eye-witness was a servant of the accused's family who refused to make any statement to the Police and it was apparent that the accused expected that he would favour the defence, it would have been most unfair to call him as a Court-witness and give the defence an opportunity of cross-examining a favourable witness, whilst preserving the right of reply. A trial must be conducted fairly, but that means that the Court must be fair to both sides. A. I. R. 1933 B. 153 = 35 Bom. L. R. 174 = 1933 Cr. C. 465. Under this section the Magistrate may summon any person as a Court-witness at any stage of the proceedings, but in fairness to the parties and with a view to afford them an opportunity of proper cross-examination, he should (save under exceptional circumstances) inform them beforehand of the names, etc., of those witnesses. 10 Lah. 790. It is open to the Court to admit rebutting evidence at any stage for the purpose of contradicting the evidence on behalf of the defence. 34 C. W. N. 170 = A. I. R. 1930 C. 134 = 31 Cr. L. J. 918 = 125 I. C. 746 = 1930 Cr. C. 134 = 15 A. I. Cr. R. 8. The Magistrate has power under this section to recall a witness before delivering judgment. But if recalled and examined, the accused has a right to further cross-examine him. A. I. R. 1931 B. 413 = 33 Bom. L. R. 652 = 1931 Cr. C. 728 = 32 Cr. L. J. 1158 = 134 I. C. 357. When after the conclusion of arguments a prosecution witness was allowed to give further evidence and produce a document, the defence must be given an opportunity of letting in rebutting evidence. 37 C. W. N. 1186.

2. **Court must examine essential witnesses** [*P.* 1170, *n.* 2].—Where certain defence witnesses were examined in the committal Court, but were not examined at the Sessions though they were present in Court and their evidence appeared to be material in the interests of justice, the Court should exercise its powers under s. 540 and examine the witnesses. A. I. R. 1931 Rang. 163 = 1931 Cr. C. 659 = 133 I. C. 488 = 32 Cr. L. J. 1067.

Where the prosecution failed to call some of the important eye-witnesses it is obviously the duty of the Magistrate to summon and examine them in order to get at the truth. **A. I. R. 1934 Rang. 105 = 35 Cr. L. J. 1362 = 151 I. C. 615 = 1934 Cr. C. 572.** It is wrong to say that this section relates only to "important documents overlooked by the prosecution." It is equally available to the defence and it is mandatory if the evidence appears to the Court to be essential to a just decision of the case. (1934) **M. W. N. 993 = 40 M. L. W. 681 = A. I. R. 1934 M. 735 (1) = 1934 M. Cr. C. 306 = 153 I. C. 627 = 1934 Cr. C. 1400.**

3. Court may examine witnesses at any stage [P. 1170, n. 4].—This section gives the Court ample powers to summon any material witness at any stage of any inquiry, trial or other proceeding. The Magistrate may admit evidence on behalf of either side at the trial, and once such evidence has been admitted on the record the Magistrate is bound to consider it while deciding whether a charge should or should not be framed. **A. I. R. 1933 Lah. 561 = 34 P. L. R. 719 = 34 Cr. L. J. 735 = 144 I. C. 331 = 1933 Cr. C. 819; 57 M. L. J. 681 = 30 M. L. W. 642 = (1929) M. W. N. 901 = A. I. R. 1929 M. 837 = 2 M. Cr. C. 298 = 1929 Cr. C. 485.**

SECTION 540-A.

Notes.—1. Presence of an accused may be dispensed with only if he is incapable of remaining before the Court.—The words "incapable of remaining before the Court," however liberally interpreted, cannot be made to include the case of a person who is in no way incapacitated from attending the Court, but wishes to go to a remote place for private reasons. It may act hardly on a particular person but it would create a most dangerous precedent to grant exemption for reasons not covered by this section. **A. I. R. 1932 A. 504 = 1932 Cr. C. 586; A. I. R. 1930 A. 817 = 1930 A. L. J. 1076 = 129 I. C. 260 = 1930 Cr. C. 1201.** If, however, the presence of the accused was dispensed with for reasons other than that of his being incapable of remaining before the Court, it was only an irregularity to which s. 537 applies if no prejudice has been caused to the accused. **A. I. R. 1930 A. 817 = 1930 A. L. J. 1076 = 129 I. C. 260 = 1930 Cr. C. 1201.**

2. Presence of accused not necessary at the time of the order.—Where the accused had been present on previous hearings, it is not necessary that he must be produced before the Court before an order dispensing with his presence is passed. **A. I. R. 1932 Lah. 103 = 135 I. C. 209 = 1932 Cr. C. 123 = 33 Cr. L. J. 97 = 33 P. L. R. 891.**

SECTION 541.

Note.—1. Scope of sub-section (1) not to prescribe the nature of custody.—This sub-section empowers the Local Government to prescribe a place for the confinement of the person mentioned therein and it cannot be invoked for the purpose of prescribing the custody in which he is to be kept. **12 Lah. 635.** A direction issued by the Local Government purporting to act under this section that certain approvers shall be confined at a certain place which was in the occupation of the police, is *ultra vires*. The Local Government can issue a direction under this section only when there is no provision made under any other law for the detention of persons, who are liable to be imprisoned or committed to custody under the Code. An approver detained in custody under s. 337 is a criminal prisoner within the meaning of the Prisons Act, 1894 for whose detention that Act makes ample provision. **12 Lah. 604; 12 Lah. 635.**

SECTION 548.

Notes.—1. Who is a "person affected by judgment or order."—There is no reason to construe the words "affected by judgment or order" narrowly. It certainly cannot be said that they refer to a person who is a party to the judgment or order, for the right of accused to a copy of the judgment are dealt with elsewhere in the Code. The public as a whole cannot fail to be affected by every judgment of a criminal Court. **53 A. 724.** A proper construction of the rules for the Subordinate Courts made by the Allahabad High Court establishes a right for the general public to inspect and have copies of the judgments of the Subordinate Courts, *ibid*.

Contra.—A third party is not a person affected by the order and is therefore not entitled to get copies under this section. **A. I. R. 1932 B. 636 = 34 Bom. L. R. 1445 = 141 I. C. 338 = 1932 Cr. C. 871 dissenting from 53 A. 724.**

2. Whether police report is part of record in proceedings under Chapter VIII.—The information or report of the police in proceedings under Ch. VIII is not part of the record within the meaning of this section. **54 M. 422.**

SECTION 549.

Amendment.—This section has been amended by the Repealing and Amending Act, 1927 (Act X of 1927) and the Amending Act, 1934 (Act XXXV of 1934) and the amended section will read thus :—

“549. (1) The Governor-General in Council may make rules consistent with this Code and the Army Act, the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934 and the Air-Force Act and any similar law for the time being in force, as to the cases in which persons subject to military, naval or air-force law shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment to which he belongs, or to the commanding officer of the nearest military, naval or air-force station for the purpose of being tried by Court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.”

SECTION 551.

Note.—The word “ may ” in this section does not mean “ must.” A. I. R. 1932 C. 850 = 139 I. C. 89 = 33 Cr. L. J. 687 = 18 A. I. Cr. R. 377 = 1932 Cr. C. 881.

SECTION 552.

Notes.—1. **Procedure** [P. 1196, n. 1]—The District Magistrate has no power to order a preliminary inquiry by a Subordinate Magistrate, for the provisions of s. 202 do not apply to cases under this section. S. 202 deals with a “ complaint of an offence ” while there is no complaint of any “ offence ” under this section, with a view that the Magistrate should punish the offender. A preliminary inquiry is also not permissible or desirable in cases under this section. A. I. R. 1933 Nag. 374 = 16 N. L. J. 310 = 1933 Cr. C. 1573.

2. **‘Unlawful detention’** means detention against the will of those entitled to minor's custody [P. 1196, n. 2]—Under the Hindu Law, upon the marriage of his minor daughter the father ceases to be her legal guardian and her husband becomes her legal guardian. It follows that if the father of a minor married girl keeps her with him against the wishes of her legal guardian he detains her “ unlawfully.” A. I. R. 1933 Nag. 374 = 16 N. L. J. 310 = 1933 Cr. C. 1573.

3. **Meaning of “unlawful purpose.”**—The words “illegal” and “unlawful” have the same meaning under the Penal Code. The word “illegal” is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action. Therefore the detention by a Hindu father of his minor married daughter contrary to the wishes of her husband with the object to remarry her would clearly constitute “unlawful detention for an unlawful purpose.” A. I. R. 1933 Nag. 374 = 16 N. L. J. 310 = 1933 Cr. C. 1573.

SECTION 556.

“PERSONALLY INTERESTED” WHAT IT MEANS.

Notes.—1. **Committing Magistrate holding identification parade, is not personally interested.**—The position of a committing Magistrate is wholly different from that of a Magistrate trying a case. The mere fact of his having held an identification parade does not disqualify him under this section from committing the case to the Sessions. 13 Lah. 461.

2. Magistrate issuing warrant for search of premises.—Where a Magistrate issued a warrant for the search of premises where gambling was reputed to take place, he should not try the case subsequently. In a case under the Gambling Act the issue of the warrant should be legal and regular and sometimes it may be necessary to examine the Magistrate who issued the warrant. It will therefore prejudice the accused if the trial is held before the same Magistrate. *A. I. R. 1934 A. 987 (2) = 4 A. W. R. 345 = 1934 A. L. R. 1113 = 153 I. C. 146 = 1934 Cr. C. 1305.*

3. Where the Judge is himself the complainant.—Where a Sessions Judge ordered a witness to be arrested and produced before the Magistrate to be tried for an offence under s. 411, I. P. C. and the Magistrate committed the accused to the Sessions before the same Judge, it was held that the Sessions Judge was disqualified from trying the case. *A. I. R. 1935 Sind 1 = 28 S. L. R. 347 = 1935 Cr. C. 42.*

SECTION 561-A.

Notes.—1. Scope of the section.—This section in no way adds to the powers of the High Court. It merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The inherent powers of the Court do not include the power to review an order which has been made in the criminal appellate jurisdiction. *61 C. 155.*

2. Powers under this section to be sparingly used.—The use of extraordinary powers ought to be reserved as far as possible for extraordinary cases. They are not usually invoked when there is another remedy available. Where the accused forged a cheque and drew money and deposited the same in a Bank, the High Court refused to make an order prohibiting the accused from operating on his account, pending investigation as there was a civil remedy for the same, and as orders in the nature of attachment before judgment are not altogether consistent with the spirit of criminal proceedings in view of the presumption that the accused is innocent until he is found guilty. *58 B. 152.* The inherent jurisdiction should be exercised with due care and caution and must conform to sound general principles and precedents and to redress only such grievances as call for an immediate relief which can be granted only by the High Court. The inherent power should not be exercised for making pronouncements upon questions of law in order to guide a Magistrate in conducting a preliminary inquiry. *11 Lah. 539.*

3. What is meant by "abuse of process."—The word "process" is a general word meaning in effect anything done by the Court. *A. I. R. 1931 Pat. 81 = 11 P. L. T. 892 = 32 Cr. L. J. 551 = 130 I. C. 538 = 1931 Cr. C. 201 = 16 A. I. Cr. R. 29.*

4. High Court's power to alter or review its judgment under this section.—This section does not affect s. 369. There never has been any inherent power in any High Court to alter or review its judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. *10 Lah. 1; 56 A. 990; 1935 A. L. J. 317 = A. I. R. 1935 A. 466.* In *41 M. 412 (P. C.)* their Lordships held that where an *ex parte* order is passed excusing the delay in presenting an appeal, it must be regarded as a tacit term of such order that though unqualified in expression, it should be open to reconsideration at the instance of the party prejudicially affected. The principle of these observations made with reference to the Code of Civil Procedure, is by no means inapplicable to the Code of Criminal Procedure as well, subject of course to the qualification that inherent power cannot be invoked on a point where the Code has made express provision. *A. I. R. 1931 Pat. 81 = 11 P. L. T. 892 = 1931 Cr. C. 201 = 130 I. C. 538 = 32 Cr. L. J. 551 = 16 A. I. Cr. R. 29.*

5. This section cannot be invoked for reconsidering the question of sentence.—It would be a very dangerous principle to allow Courts to reconsider sentences when once they have passed judgment. There are provisions in the Code for appeal and for revision when the question of sentence must always be one of the factors considered. Where it has been so considered and a judgment or order has been passed, it must be final under s. 369 of the Code and the provisions of this section cannot be invoked. *A. I. R. 1931 Nag. 169 = 27 N. L. R. 163 = 1931 Cr. C. 830 = 32 Cr. L. J. 1222 = 134 I. C. 686.* Where however there was a mistake in the time fixed for carrying out the sentence of whipping which was brought to the notice of the High Court on a reference by the Sessions Judge after the appeal by the accused had been dismissed, there was no question of reconsidering the sentence and the sentence of whipping was directed to be carried out immediately so as to be in accordance with law under the powers conferred by this section. *A. I. R. 1934 Pat. 551 = 15 P. L. T. 475 = 38 Cr. L. J. 100 = 152 I. C. 291 = 1934 Cr. C. 1195.*

6. **Section cannot be used for entertaining appeals presented out of time.**—Even under the provisions of this section the High Court has got no power to entertain an appeal presented beyond the time allowed by the limitation schedule. **A. I. R. 1931 Nag. 101 = 122 I. C. 257 = 31 Cr. L. J. 381 = 1931 Cr. C. 453.**

7. **High Court can order retrial.**—Where it appeared that one of the assessors expressed himself as being determined to help the accused, the High Court has power under this section to order a new trial with different assessors. **15 Lah. 20.**

SECTION 562.

TO WHAT OFFENCES SECTION APPLIES.

Notes.—1. **Meaning of “death or transportation for life.”**—The phrase must be interpreted disjunctively, and women convicted of an offence for which transportation for life is one of the punishments provided, are ineligible for release on probation. The words “death or transportation for life” must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments to be awarded and not necessarily both. **A. I. R. 1932 Nag. 130 = 1932 Cr. C. 666 = 28 N. L. R. 260 = 33 Cr. L. J. 844 = 140 I. C. 59.**

2. **Previous conviction need not be only under the Penal Code.**—Sub-section (1) is expressed in general language and covers the case of a conviction under any law. Where therefore the accused had a previous conviction under s. 12, Bombay Prevention of Gambling Act, the provisions of s. 562(1) cannot be applied to him. **37 Bom. L. R. 182 = A. I. R. 1935 B. 188.**

3. **Sub-section (1-A) applies only to the offences specified.**—The terms “theft,” “theft in a building,” “dishonest misappropriation” and “cheating” refer to the offences in the Penal Code which are denoted respectively thereby, namely, s. 379, *pro tanto*, s. 380, s. 403 and s. 415. If the accused is convicted for criminal breach of trust under s. 406, I. P. C. he cannot be released with admonition under this sub section. **12 Rang. 259 ; (1934) M. W. N. 1283.**

4. **Sub-section (1-A) applies also to offences punishable with fine only.**—This sub-section deals with offences “punishable with not more than two years’ imprisonment.” It covers an offence punishable with fine only which cannot be said to be more than two years’ imprisonment. **59 B. 352.**

PRACTICE.

5. **Discretion must be properly exercised.**—The exercise of discretion given to Magistrates under this section needs a considerable sense of responsibility and the Magistrates should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy. The fact that the accused has not been convicted before, is not in itself a sufficient reason for inflicting no penalty on him ; and it cannot be doubted that the knowledge that a first offence will go unpunished is very apt to lead the young into a course of crime. **A. I. R. 1933 Sind 44 = 27 S. L. R. 34 = 34 Cr. L. J. 420 = 142 I. C. 544 = 1933 Cr. C. 190 ; A. I. R. 1934 Sind 93 = 27 S. L. R. 463 = 35 Cr. L. J. 1149 = 150 I. C. 763 = 1934 Cr. C. 752 ; 10 Lah. 876.**

6. **Contents of the order under this section [P. 1219, n. 14].**—An order of imprisonment on failure to furnish security could not be added to the order of release on probation of good conduct. **15 Lah. 824.**

7. **Sentence to be nominal if accused unable to find surety [P. 1219, n. 17].**—There is no warrant for the proposition that if an accused person fails to furnish security under this section he should be detained in prison till the expiration of the period for which the security was to be given. In the event of failure to furnish security a nominal sentence should be passed. **15 Lah. 824.**

8. **When surety withdraws accused must be allowed to find another surety.**—Where a surety got his security bond cancelled, the Magistrate should not direct the imprisonment of the convict at once but should give him an opportunity to execute another bond with a fresh surety. **15 Lah. 824.**

9. **Sentence of imprisonment or fine after an order under this section illegal [P. 1219, n. 17-A].**—A sentence of imprisonment imposed upon the accused while he was released on probation of good conduct is illegal. **15 Lah. 872.** To impose a sentence of fine is also illegal. **10 Lah. 722.**

APPEAL AND REVISION.

10. **Appeal from orders** [*P.* 1219, *n.* 18]—Under s. 408 any person “convicted” on a trial held by a Magistrate of the First Class may appeal to the Court of Session. S. 562 provides that a first offender dealt with under its provisions must first be “convicted.” If the word “conviction” be consistently given its ordinary sense of an adjudication of guilt, there is no doubt that an order passed under s. 562, is appealable. *A. I. R.* 1935 *M.* 157 = (1934) *M. W. N.* 1318 = 41 *M. L. W.* 22 = 1934 *M. Cr. C.* 374 = 154 *I. C.* 879 = 1935 *Cr. C.* 179.

11. **Under present section Appellate or Revisional Court may pass sentence of imprisonment** [*P.* 1219, *n.* 19]—Sub-section (3) added newly in 1923, specifically empowers the High Court on appeal or when exercising its powers of revision to set aside the order of the trial Magistrate and in lieu thereof to pass a sentence on the offender according to law. 14 *Lah.* 800.

SECTION 565.

Note.—Section applies only when the accused has been previously convicted [*P.* 1221, *n.* 1]—No order under this section can be passed against a person who is not a previous convict. *A. I. R.* 1934 *Lah.* 675 (1) = 35 *P. L. R.* 615 = 1934 *Cr. C.* 1001 = 153 *I. C.* 434.

SCHEDULE II.

Amendment.

1. (i) In the entries in column 2 against sections 131, 133, 135, 136 and 138 for the words “or sailor” the words “sailor or airman” shall be substituted;

(ii) In the entry in column 2 against section 140, after the word “soldier” in both places where it occurs, the words “sailor or airman” shall be inserted—**Act X of 1927.**

2. In column 1 the figures 159 were omitted by **Act XXXVII of 1925.**

3. By **Act XXV of 1927**—

(i) After the entry relating to s. 295 of the Indian Penal Code, the following entry was inserted, namely :—

“295-A. Maliciously insulting the religion or the religious beliefs of any class.	Shall not arrest without warrant.	Warrant.	Not bail-able.	Not com-pound-able.	Imprisonment of either description for two years, or fine, or both.	Court of Session or Presidency Magistrate.”
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(ii) For the entries in the third, fourth, fifth, sixth and eighth columns relating to section 296 of the Indian Penal Code, the following entries were substituted, respectively, namely :—

“May arrest without warrant.	Summons. Bailable.	Not com-poundable.	Presidency Magistrate or Magistrate of the First or Second Class.”
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4. For the entry against section 376, the following entries were substituted by **Act XXIX of 1925**, namely :—

Of Rape.

376 Rape—

If the sexual intercourse was by a man with his own wife not being under 12 years of age.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for two years, or fine, or both.	Court of Session, Chief Presidency Magistrate or District Magistrate.
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If the sexual intercourse was by a man with his own wife being under 12 years of age.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for ten years and fine.	Court of Session.
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In any other case.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for ten years and fine.	Court of Session.
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5. Sections 490 and 492, I. P. C. were repealed by **Act III of 1925**, and consequently the entries relating thereto in the second schedule have to be omitted.

SCHEDULE III.

1. Item (16) in Head I and items (15) and (16) in Head V were repealed by **Act XXXVII of 1925**.

2. In item (1-a) of Part V for the figures and letter "29-A" the figures and letter "29-B" were substituted by **Act XXIV of 1934**.

APPENDIX I.

EXTRACTS FROM THE LETTERS PATENT OF THE HIGH COURT OF JUDICATURE, MADRAS.

Clause 22.

Note.—Governor-General may by Ordinance alter or amend the Letters Patent.—S. 106, Government of India Act leaves the definition of the High Court's Original Criminal Jurisdiction to be made by the Letters Patent. It is within the power of the Indian Legislature to alter and amend the Letters Patent and consequently within the Ordinance-making power of the Governor-General under the Government of India Act 60 C. 814; 57 B. 93 (S. B.)

Clause 26.

Notes.—1. Whether the Advocate-General's decision is conclusive as to the existence of point of law.—The Advocate-General derives his powers of certification from cl. 26 and cl. 26 alone. His powers are limited to points of law decided. If there is no point of law or no decision upon it, then he has no jurisdiction

to grant a certificate. The High Court is not bound to entertain the reference where the Advocate-General has mistaken a question of fact for a point of law or mistakenly thought that there has been a decision upon it. (1934) M. W. N. 1410 (F. B.) = 68 M. L. J. (Supplement.)

2. What is a "decision" of a point of law.—In (1930) M. W. N. 249 (F. B.) it was held that a mistake made by the trial Judge in stating the law to the jury was a misdirection and amounted to a "decision" of a point of law. *Wallace, J.* who delivered the judgment of the Court (*Eddy, J. dissenting*) held that the words "decision of a point of law" were not confined to the point of law specifically put up and decided by the trial Court, but the word "decision" included every mental conclusion on which the judgment or charge was based, whether stated or not stated and whether stated correctly or mis-stated. In other words "decision of a point of law" would include any "matter of law" as is mentioned in s. 418, Cr. P. C., i.e., such misdirection or non-direction as would permit an appeal from a *mofussil* Court against the verdict of a jury, including errors of procedure. This view of the Full Bench in (1930) M. W. N. 249 was considered by a Full Bench of seven Judges in (1934) M. W. N. 1410 and it was held by, the Full Bench (*Madhavan Nair and Curgenven, JJ., dissenting*) disagreeing with the observations of *Wallace, J.* in (1930) M. W. N. 249, that it would be stretching the meaning of the word "decision" beyond reasonable limits to hold that the reception of inadmissible evidence where no objection is taken as to its admissibility and the Judges' mind was not directed to the question of its admissibility, was a decision of a point of law. It was held that under cl. 26 there must be first, some point or points of law and secondly a decision thereon.

Clause 39.

Note.—No appeal against orders made in criminal jurisdiction [*P. viii, n. 1*].—The words "in any matter not being of criminal jurisdiction" govern all the classes of judgments or decrees or orders which are hereinafter in that clause mentioned. 58 C. 344.

Clause 41.

Notes.—1. Scope of the clause.—No application for leave to appeal lies to the Privy Council under this clause against an order made by the High Court in the exercise of its revisional jurisdiction. 62 C. 389. Where the High Court confirms the sentence on a reference under s. 374, Cr. P. C. or the Judge disagreeing with the jury refers the case to the High Court and the High Court convicts the accused on such reference, the High Court cannot be said to be acting "in the exercise of original criminal jurisdiction" and the High Court cannot therefore be moved to grant leave to appeal in such a case. 14 Pat. 318.

2. Principles which guide the Privy Council in dealing with criminal appeals [*P. x, n. 4*].—Their Lordships of the Privy Council have frequently stated that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice. 59 I. A. 233 = 13 Lah. 479.

APPENDIX II.

THE INDIAN EXTRADITION ACT, 1903.

(ACT XV OF 1903.)

CHAPTER III.

Note.—Government may exercise powers either under the Act, or under the terms of Treaty, if any.—The Indian Extradition Act is the law of the land, not so far as the third chapter is concerned, to be applied to this or that country by Order in Council or by any special means. If some special procedure has been arranged by Treaty, s. 18 of the Act provides that it may be followed; but if the Government choose to exercise the powers given by the Act, no Court could interfere on the ground that the Government had undertaken to act otherwise by Treaty. 12 Pat. 347.

SECTION 7.

Note.—Proceedings of Magistrates on a warrant issued by the Political Agent whether open to revision [P. xx, n. 7].—When a Magistrate orders execution of a warrant issued by the Political Agent it cannot be said that he is acting in his judicial capacity or that he is for the time being a Court of inferior criminal jurisdiction under s. 435, Cr. P. C. The Magistrate's order is a mere executive act which he is bound to perform under s. 7. The High Court has therefore no jurisdiction to interfere with the proceedings on the revisional side. The release of the accused on bail is also not a judicial act. But under s. 491, Cr. P. C. the High Court has power to direct that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law and that a person illegally and improperly detained in public or private custody within such limits be set at liberty. 56 A. 409. In 53 B. 149 it was however held that the intention of the Legislature in referring the extradition warrant to the District Magistrate or the Chief Presidency Magistrate is that the Magistrate should judicially consider the matter and decide whether the warrant can be executed according to law. Any order judicially made by the Magistrate would be subject to the revisional powers of the High Court under s. 439, Cr. P. C. The High Court has also powers under s. 561-A, Cr. P. C. in addition to its powers under the Letters Patent to interfere in order to secure the ends of justice. It would also have power to interfere in proceedings taken under s. 491 to set at liberty persons illegally detained. 53 B. 149.

SECTION 10.

Note.—Arrest without warrant illegal.—The provisions of the Act with reference to procedure should be construed strictly in favour of the subject. When a warrant has been received in respect of an extradition offence the procedure should be as under s. 7. When a requisition is received in respect of any offence, the procedure should be as under s. 9. But when neither a warrant nor a requisition has been received, the Magistrate is empowered to issue a warrant under s. 10. In such a case it is essential that there should be a warrant and a mere order to the police to arrest the accused is not sufficient. 62 C. 399.

SECTION 18.

Note.—Procedure to be observed in Extradition Proceedings between the British Government in India and the French Settlements in India.—The East India Dependencies of France were expressly excluded from the Extradition Treaty of 1876 and therefore they are not States or parts of a State to which the Extradition Acts of 1870 and 1873 apply. They would therefore not be "Foreign States" within the meaning of the Extradition Act. Extradition in the East Indian Possessions of the two countries is governed by the Treaty of 1815 the necessary Legislative sanction for which has been provided by s. 18. When therefore the Treaty says that offenders shall be extradited on demand it is not open to a Municipal Court to say that they shall not be delivered up until some form of procedure initiated, prescribed and sanctioned by itself alone and not agreed upon by the High Contracting parties, is satisfied. 53 M. 1023.

APPENDIX III.

THE WHIPPING ACT, 1909.

(ACT IV OF 1909.)

SECTION 3.

Note.—Whipping to be imposed "in lieu of" other punishment [P. xxxiii, n. 3].—When under s. 423 (1) (b), Criminal Procedure Code an appellate Court alters a sentence of imprisonment to a sentence of whipping, even if the accused has already undergone a part of the sentence of imprisonment, in law the sentence of imprisonment ceases to exist and the sentence of whipping which is in law the only sentence, is a sentence in lieu of and not in addition to the punishment to which the accused was originally sentenced. 10 Rang. 317.

SECTION 4.

Note.—Whether a sentence of whipping *plus* fine is legal in the case of an offence where imprisonment is imperative under the Penal Code.—Under s. 3 of the Whipping (Burma Amendment) Act, 1927 an offence under s. 325, I. P. C. is included among the offences punishable with whipping in lieu of or in addition to any other punishment. The punishment under s. 325, I. P. C. is either “imprisonment” or “imprisonment and fine.” Therefore a person committing an offence thereunder may be punished with whipping in lieu of or in addition to “imprisonment and fine.” But as fine alone is not one of the punishments under this section whipping cannot be awarded in lieu of or in addition to fine alone. 13 Rang. 115.

SECTION 5.

Note.—This section does not supersede s. 4 under which a sentence of whipping in addition to imprisonment is legal. S. 5 is meant to be applied in proper cases alternatively with ss. 3 and 4 which apply to juvenile offenders as well as to offenders not within the definition of juvenile offenders. A. I. R. 1932 Pat. 334 = 13 P. L. T. 573 = 1932 Cr. C. 851 = 140 I. C. 11. On a proper construction of ss. 4 and 5 a sentence of imprisonment can be awarded in addition to whipping in the case of a juvenile. 1929 A. L. J. 224 = A. I. R. 1929 A. 322 = L. R. 10 A. (Cr.) 60 = 30 Cr. L. J. 1087 = 119 I. C. 572 = 11 A. I. Cr. R. 424. See A. I. R. 1934 A. 976 = 4 A. W. R. 669 = 1935 A. L. R. 15 = 153 I. C. 582 = 1934 Cr. C. 1300.

APPENDIX IV.

THE REFORMATORY SCHOOLS ACT, 1897.

(ACT VIII OF 1897.)

SECTION 8.

Note.—Sentence of transportation or imprisonment condition precedent to detention [*P.* xl, n. 4]—Before any steps could be taken under s. 8 (1), conviction and sentence should have been recorded allowing the accused an opportunity of appealing. A. I. R. 1934 Pesh. 29 (2) = 36 P. L. R. 79 = 1934 Cr. C. 648 = 149 I. C. 1128.

APPENDIX VI.

THE CATTLE TRESPASS ACT, 1871.

(ACT I OF 1871.)

SECTION 10.

Note.—When cattle may be seized [*P.* lxii, n. 2]—The right of capture of the cattle would not of course extend to following them to their sheds and seizing them there; but if the owner of a field attempts to seize them while actually trespassing, he is within his rights in capturing them before they have definitely made their escape from the spot, even though they were not actually inside the field when captured. A. I. R. 1934 Nag. 258 = 153 I. C. 427 = 1934 Cr. C. 1297.

SECTION 11.

Note.—No damage necessary under this section.—The Legislature with a view to protect the person and property of the public in general has made it an offence to let cattle stray about without there being any one to look after them. The legality of the seizure of such cattle and the conviction of the person responsible is not therefore made dependent on actual damage being caused. A. I. R. 1934 Sind 34 = 28 S. L. R. 73 = 35 Cr. L. J. 830 = 148 I. C. 982.

SECTION 21.

Note.—Agent personally acquainted with the circumstances.—Complaint not made either by the complainant in person or by an Agent personally acquainted is not a valid complaint and the defect cannot be cured under s. 537 of the Criminal Procedure Code. An Agent personally acquainted need not necessarily mean an eye-witness, but it may mean an Agent or servant who could be said to have acted as Agent who, if not present at the time of seizure had received information of it shortly after the event and was in a position to verify the information given to him. It cannot however include an Agent who lives at a distance and who has received information of the seizure second hand. *A. I. R. 1931 Nag. 98 = 1931 Cr. C. 450 = 27 N. L. R. 167 = 132 I. C. 457 = 32 Cr. L. J. 896.*

SECTION 22.

Note.—No order can be made under this section for payment of pleader's fees.—This section does not permit the award of pleader's fees to a successful complainant. *65 M. L. J. 24 = (1933) M. W. N. 549 = 37 M. L. W. 736 = A. I. R. 1933 M. 502 = 1933 M. Cr. C. 228 = 34 Cr. L. J. 679 = 144 I. C. 154 = 1933 Cr. C. 779.*

APPENDIX IX.

THE PRISONERS ACT, 1900.

(ACT III OF 1900.)

SECTION 3.

Note.—Court can inquire into the treatment of undertrial prisoners.—When an undertrial prisoner is committed to custody the officer-in-charge of the jail is bound to treat him as an "undertrial prisoner" according to the provisions of the Act. If a prisoner complains to the Court that he is not so being treated and that he is subjected to hardships in violation of the rules, the Court has power to ask for information in order to satisfy itself that he is being treated according to law, and if it is found that the action taken by the jail authorities is not warranted by the Prisoners Act or the rules made thereunder, the Court could issue such directions as may be necessary in the interests of justice consistently with those statutes and rules. *A. I. R. 1931 Lah. 562 = 32 P. L. R. 586 = 133 I. C. 59 = 32 Cr. L. J. 988 = 1931 Cr. C. 850.*

APPENDIX X.

THE PRISONS ACT, 1894.

(ACT IX OF 1894.)

SECTION 40.

Notes.—1. **Meaning of "persons."**—"Persons" means "all persons" or "any person" and not "a certain class of persons." *14 Lah. 182.*

2. **Courts have no jurisdiction to enforce the provisions of this section.**—The jurisdiction of the Courts only extends to insistence on the due observance of the terms of the writ which it has issued in exercise of its legal powers. The terms of the writ are limited by the contents which say nothing about visits, medical treatment, bedding, etc., nor the taking of such disciplinary action as may be necessary during the confinement of the prisoner. *14 Lah. 182.*

APPENDIX XI.**THE INDIAN OATHS ACT, 1873.**

(ACT X OF 1873.)

SECTION 4.

Amendment.—In clause (b) after the word “military” the words “or air-force” shall be inserted—**Act X of 1927.**

SECTION 8.

Notes.—1. **Initiative to take special oath must come from parties.**—The Court should not take the initiative in suggesting that the parties should take special oath. Under this section the initiative should come from the parties. **A. I. R. 1933 C. 116 = 36 C. W. N. 786 = 56 C. L. J. 77 = 139 I. C. 836.**

2. **When party should be permitted to withdraw from oath.**—If a party after agreeing to abide by an oath satisfied the Court that there is good ground for retracting, the Court would exercise a wise discretion in refusing to administer the oath and it is only when a party puts forward frivolous reasons for retracting that the Court would be justified in administering the oath notwithstanding the retraction. **A. I. R. 1933 A. 184 = 1933 A. L. J. 69 = 146 I. C. 569.**

SECTION 9.

Notes.—1. **Who is a party.**—The word party in s. 9 includes a duly authorised agent. **A. I. R. 1931 Oudh 380 = 8 O. W. N. 880 following A. I. R. 1929 Oudh 56 = 114 I. C. 759.**

2. **The application for an oath must be unconditional.**—An application under this section must be one without any condition such as if the Court does not hold the evidence to be sufficient. It is not open to a party to ask the Court to adjudicate and if the Court adjudicates against him, then to ask the Court to start a separate proceeding under this Act. **A. I. R. 1932 A. 404 = 1932 A. L. J. 481 = 138 I. C. 606.**

3. **Party may resile from oath before it is taken.**—When the defendant agreed to abide by the oath of the plaintiff it is open to the defendant to resile at any time before the statement on oath had been taken. No conditions are attached to the desire to resile and it is not necessary that the Court should be satisfied that the party had good reasons for resiling. **1935 A. L. J. 212.**

SECTION 10.

Note.—Offer of special oath once made can be withdrawn.—**A. I. R. 1931 C. 549 = 35 C. W. N. 130 = 132 I. C. 682. But see 55 A. 298.**

SECTION 11.

Note.—Where a defendant offered to be bound by the oath of a witness, the evidence of that witness is conclusive proof of the matter so far as the defendant who offered to be so bound is concerned. Ss. 9 and 11 do not require that all the parties should agree to be so bound. The evidence given is binding as against those parties who have offered to be bound. **1929 A. L. J. 1095 = A. I. R. 1929 A. 759 (1) = 118 I. C. 188.**

SECTION 13.

Note.—This section cures the form of the oath and even an entire omission to take the oath, but does not cure the absence of authority in the officer administering the oath. **A. I. R. 1929 B. 136 = 31 Bom. L. R. 144 = 30 Cr. L. J. 593 = 116 I. C. 248 = 13 A. I. Cr. R. 14.** Where a child aged about six-and-a-half years was found to be a person capable of testifying as a witness, under s. 118, Evidence Act, but the Court did not administer the oath holding that he could not understand its significance owing to his tender years, held that the omission was cured under section 13. **1935 A. L. J. 618 = A. I. R. 1935 A. 579.**

APPENDIX XII.**THE INDIAN CRIMINAL LAW (AMENDMENT) ACT, 1908.**

(ACT XIV OF 1908.)

SECTIONS 15 TO 18.

Notes.—1. Notification declaring an Association unlawful, must be duly published.—In order to prove that an Association has been declared unlawful, the Government must not only insert the declaration in the official *Gazette* but must publish the *Gazette* in the manner usually adopted for its publication and allow a reasonable opportunity to people concerned to see the *Gazette*. 55 B. 336. An Association does not become unlawful until the notification is actually published. 12 Lah. 471.

2. A general notification whether valid.—A general notification declaring unlawful all Associations by whatever name known or whether known by any distinctive name or not which had certain specified objects, is valid there being sufficient compliance with ss. 15 and 16. 37 C. W. N. 964 = A. I. R. 1934 C. 161 = 35 Cr. L. J. 605 = 148 I. C. 155 = 1934 Cr. C. 287.

3. Accused must be shown to be members of the Association after it is declared unlawful.—There can be no justification for presuming that because a person was a member of an Association which was lawful, he remained a member of that Association after it became unlawful. S. 17 does not impose upon the members the obligation of doing anything specific to terminate their membership. The powers given by sections 16 and 17 were not intended to be used so as to make people liable to penalties for having been members of Associations at a time when they were lawful. 55 B. 484; 33 Bom. L. R. 333 = A. I. R. 1931 B. 203 = 32 Cr. L. J. 725 = 131 I. C. 479 = 1931 Cr. C. 347. Sections 16 and 17 cannot be construed as having retrospective operation. The very fact that membership of a particular Association was not unlawful until such time as the Local Government chose to declare it an unlawful Association makes it imperative for the prosecution to prove some overt act or conduct on the part of the person concerned which establishes his connection with the Association at some time subsequent to such declaration. In any case, ordinary rules of justice and common sense require that those who were connected with the Association at the time when it was declared unlawful should be given a *locus poenitentiae* to withdraw from its membership within a reasonable time of its notification as such. A. I. R. 1931 Lah. 145 = 32 P. L. R. 71 = 1931 Cr. C. 257 = 131 I. C. 353 = 32 Cr. L. J. 700; A. I. R. 1931 Lah. 153 = 1931 Cr. C. 265 = 131 I. C. 360 = 15 A. I. Cr. R. 477 = 32 Cr. L. J. 708.

The mere fact that at a Political Conference people were asked to join the Congress and the boycott of British goods was preached and also Civil Disobedience movement was promoted, does not make the Conference identical with the Congress Committees which had been declared unlawful. It must be established by evidence that the Conference was really a meeting of the Association declared unlawful. A. I. R. 1932 Lah. 615 (2) = 1932 Cr. C. 922 = 33 P. L. R. 1071 = 140 I. C. 442 = 34 Cr. L. J. 25 = 19 A. I. Cr. R. 98.

4. Disobedience of order to disperse.—Disobedience of a command to disperse is not an ingredient of an offence under this section. A. I. R. 1932 Sind 211 = 1932 Cr. C. 902 = 26 S. L. R. 345 = 34 Cr. L. J. 67 = 140 I. C. 697.

5. What is assisting the operation of unlawful Association.—The question whether particular acts amount to assisting the operations of an unlawful Association must be determined in the circumstances of each case. There must be such a connection between the acts of the accused and the operations of the unlawful Association that an intention to assist the operations of such Association may be properly inferred. The mere existence of a common aim between the person accused and the unlawful Association is not enough. 55 B. 442; A. I. R. 1932 Lah. 578 = 33 P. L. R. 1002 = 140 I. C. 608 = 34 Cr. L. J. 72 = 1932 Cr. C. 806; 63 M. L. J. 906 = (1932) M. W. N. 1357 = A. I. R. 1933 M. 123 = 1933 M. Cr. C. 1 = 1933 Cr. C. 155 = 34 Cr. L. J. 90 = 140 I. C. 767; (1932) M. W. N. 1265 = A. I. R. 1933 M. 389 = 5 M. Cr. C. 390 = 34 Cr. L. J. 823 = 144 I. C. 765 = 1933 Cr. C. 552. Assisting the operations of the Association need not be with the co-operation of such Association. A. I. R. 1931 B. 206 (2) = 1931 Cr. C. 350 = 33 Bom. L. R. 314 = 131 I. C. 839 = 32 Cr. L. J. 804. The display of a Congress flag is no more than an expression of sympathy with the Congress propaganda, and an expression of sympathy is not a criminal offence. It cannot in any way be said to assist the operation of an unlawful Association. A. I. R. 1933 A. 95 = 140 I. C. 497 = 34 Cr. L. J. 22 = 1933 Cr. C. 121; A. I. R. 1933 C. 695 (4) = 145 I. C. 240 = 37 C. W. N. 992 = 1933 Cr. C. 1162 = 34 Cr. L. J. 925.

APPENDIX XIII.

GENERAL POLICE ACT, 1861.

(ACT V OF 1861.)

SECTION 7.

Note.—Order both of suspension and confinement illegal.—This section does not contemplate confinement in addition to suspension and certainly not indefinite confinement. Any rule requiring police-officers under suspension to reside in the lines is *ultra vires* and illegal. Conviction under s. 29 for leaving the police lines is therefore unsustainable. 58 C. 1132.

SECTION 29.

Notes.—1. "Police-officer" includes constable.—The expression "Police-officer" throughout the Act has been used to apply to all the members of the Police force in whatever capacity they may be employed. A constable is therefore a "Police-officer" within the meaning of this section. A. I. R. 1929 Lah. 325 = 30 Cr. L. J. 635 = 116 I. C. 611 = 13 A. I. Cr. R. 46.

2. Wilful breach or neglect of duty [P. cxxiii, n. 8].—Where a constable was deputed to escort a prisoner to another place, and after delivering the prisoner there, he delayed his return by two days and no order was found to have been given requiring him to return by a specified date, while in similar circumstances other police-officers had been allowed two days' halt, *held*, that the constable could not be held to be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by a competent authority. A. I. R. 1929 Lah. 325 = 30 Cr. L. J. 635 = 116 I. C. 611 = 13 A. I. Cr. R. 46.

SECTION 30.

Notes.—1. A general order requiring license to be taken out for processions is *ultra vires*.—The section does not empower the issuing of a general order that anyone taking out a procession passing a mosque must take out a license. There must be some procession or meeting actually in contemplation at the time and then only can the Superintendent of Police with the approval of the District Magistrate or Sub-divisional Magistrate call upon the convener of the assembly or procession to apply for a license. 58 C. 879.

2. Superintendent of Police has no power to absolutely forbid the taking out of a procession.—Under sub-sec. (3) the Superintendent of Police may issue a license or may not issue a license. The Act does not in terms give him authority to *refuse* to issue a license. If there is no danger to the public peace he may consider it unnecessary to issue a license to regulate or direct the conduct of the procession at all and in that case he may not issue a license at all and in such a case it would be no offence to take out a procession merely because no license had been issued though applied for. The section gives no power to the authorities to forbid the taking out of a procession. 1935 A. L. J. 386. The word "regulate" would not cover an absolute prohibition of every kind of music. 51 A. 485.

3. Applicant for license need not provide sureties.—There is no provision of law which makes it incumbent on an applicant for a license to provide sureties or which authorises the officers concerned to demand such sureties. The licensee alone is bound by the terms of the license. 10 Lah. 852.

4. Responsibility of licensee.—A licensee assumes responsibility for the entire conduct of the procession and component members and he cannot repudiate responsibility on the ground that the violation of the conditions took place without his consent or knowledge. Before prosecuting the licensee for breach of the conditions it is not necessary that the police should have taken action under s. 30-A for dispersal of the procession. 10 Lah. 852.

5. Sub-sec. (2) applies only to directors or promoters of procession.—Only the directors or promoters of the procession are under an obligation to apply for a license. If they were merely ordinary members of the procession, even though they were at the head of the procession and were garlanded, the sub-section does not apply to them. A. I. R. 1933 C. 353 = 1933 Cr. C. 489 = 144 I. C. 185 = 34 Cr. L. J. 688.

SECTION 31.

Note.—Duty of keeping order, etc., in public roads does not empower the dispersal of processions.—Where certain people were taking a procession along a public road and the Police Sub-Inspector ordered them to disperse under s. 31 and on their not obeying the order arrested them under ss. 32 and 34, it was held that the order for dispersal was not legally justifiable. Under s. 31 the Police have power to pass any order reasonably necessary for “keeping order” or “preventing obstruction.” The processionists were not disorderly and the obstruction to traffic could have been avoided by asking the processionists to make room for traffic. 1931 Lah. 33 = 1931 Cr. C. 97 = 32 P. L. R. 52 = 130 I. C. 425 = 32 Cr. L. J. 532 = 16 A. I. Cr. R. 5.

SECTION 32.

Note.—What is a procession.—“Procession” has been defined in Murray’s Dictionary as “the action of a body of persons going or marching along in orderly succession in a formal or ceremonial way, especially as a religious ceremony or on a festive occasion.” Where the image was merely carried down by some four or five carriers and immersed in the river and there was no music nor did anyone accompany the idol except the persons who actually carried it, it was held that there was no procession for which a license would be required. A. I. R. 1931 C. 128 = 130 I. C. 239 = 1931 Cr. C. 160 = 32 Cr. L. J. 482.

SECTION 42.

Notes.—1. Scope of the section.—This section refers to actions for “anything done or intended to be done under the provisions of this Act or under the General Police powers hereby given.” The section does not apply to anything done by a police-officer in his capacity as an investigating police-officer in the exercise of powers conferred upon him by the Criminal Procedure Code. 53 A. 44. A report by a Sub-Inspector of Police to a superior officer regarding suspicions against persons residing within his jurisdiction is a report falling within s. 23 and the period of limitation for bringing a suit for damages for making a false report is governed by s. 42. A. I. R. 1930 Lah. 592 (1) = 31 P. L. R. 883 = 125 I. C. 379.

2. Section does not require notice of criminal prosecution.—The word “action” as used in this section means a civil action. Notice of a criminal prosecution is not required by this section. A. I. R. 1934 Nag. 206 = 30 N. L. R. 348 = 35 Cr. L. J. 1416 = 151 I. C. 759 = 1934 Cr. C. 900.

3. Limitation [P. cxxvi, n. 1].—On the passing of the Limitation Act IX of 1871 that part of s. 42 providing a period of three months for suits contemplated by it was repealed and such suits became subject to the general law of limitation. 53 A. 44.

THE CALCUTTA POLICE ACT, 1866.

(BENGAL ACT IV OF 1866.)

SECTION 50-A.

Note.—What is meant by game of “mere skill.”—A game of “mere skill” should be taken to mean one in which a person playing it, as far as possible in any human affairs, has complete control over the result which he sets out to attain, provided he is sufficiently expert in performance. The question is not one as to whether the element of skill or chance predominates. The real question is whether the results sought to be obtained can be achieved by the person seeking to attain it if he has sufficient expertness to bring it about. A. I. R. 1933 C. 8 = 37 C. W. N. 24 = 1933 Cr. C. 28 = 141 I. C. 593 = 34 Cr. L. J. 168 = 19 A. I. Cr. R. 352.

SECTION 54-A.

Notes.—1. When accused should be called upon to account for his possession.—There must be reason to believe that the article was stolen or fraudulently obtained. The facts must be shown and findings arrived at that there is “reason to believe.” What is wanted is a reasonable belief and not reasonable suspicion. A. I. R. 1932 C. 489 = 55 C. L. J. 96 = 36 C. W. N. 512 = 1932 Cr. C. 481 = 138 I. C. 636 = 33 Cr. L. J. 643.

2. Section should be strictly construed.—The section is revolutionary in its character, relieving as it does, the prosecution of its ordinary burden of proof beyond what is necessary to create a reasonable suspicion and throwing the entire *onus* on the accused, of removing the suspicion. A penal provision of such a character should be strictly construed. 33 C. W. N. 477 = 49 C. L. J. 506 = A. I. R. 1929 C. 401 = 31 Cr. L. J. 59 = 120 I. C. 260 = 1929 Cr. C. 31.

SECTION 62-A.

Notes.—1. Discretion as to the issue of orders under this sub-section must be left to the Commissioner of Police.—The Commissioner is responsible immediately for law and order and for the regulation of traffic in Calcutta, and when he passes an order forbidding processions on a particular day, it must be presumed that he considered such an order necessary for the fulfilment of his duties. The decision must be left to him so long as he is held responsible and has to answer for the consequences of any breach of public order or dislocation of traffic. 58 C. 1303.

2. Previous sanction of Commissioner of Police not necessary for exercise of powers under sub-section (1).—Under this sub-section if the Commissioner of Police is personally present he may give certain directions. If he is not personally present his subordinates not below the rank of Sub-Inspector may give such directions. In the latter case his order is subject to the orders of the Commissioner of Police and not with the previous sanction of the Commissioner of Police. A. I. R. 1933 C. 36 = 36 C. W. N. 722 = 56 C. L. J. 231 = 140 I. C. 550 = 1933 Cr. C. 71 = 34 Cr. L. J. 36 = 19 A. I. Cr. R. 113.

3. The Commissioner of Police cannot make a general order prohibiting all processions.—Sub-section (4) does not empower the Commissioner of Police to issue an order prohibiting all public processions in the City and suburb of Calcutta. The phrase “any procession or public assembly” has reference to some particular procession or processions upon a particular occasion or having a particular character or object which it is necessary to prohibit for the preservation of the public peace, or public safety. Nor can the Commissioner of Police under this sub-section substitute a system of license or permission for such processions or assemblies. 58 C. 971.

4. Sub-sec. (4) Governor-in-Council may extend the prohibition to beyond seven days, simultaneously with the promulgation of the order.—This section contemplates that an order may be made by the Commissioner of Police which will subsist for seven days without further sanction. It contemplates that at or before the end of the seven days the Governor-in-Council may extend the period. If he does extend it, he may extend it until further orders. There is however no objection to the sanction of the Governor-in-Council being taken at the time of the making of the order. 58 C. 971.

